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Exterior Systems, Inc. *and* Operative Plasterers and Cement Masons International Association of United States and Canada, AFL–CIO, Local 8. Case 4–CA–29852

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On July 18, 2001, Administrative Law Judge D. Paul Bogas issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the judge's recommended Order as modified.[3]

1. The General Counsel and the Charging Party except to the judge's findings that the Respondent did not violate Section 8(a)(3) and (1) by failing to hire or consider for hire James Kilkenny, a union organizer for the Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL–CIO, Local 8 (the Union), after he applied for work on August 16, 2000, and again on October 3, 2000.[4]

The credited facts relating to these allegations, which are more fully set forth in the judge's decision, are summarized as follows. The Respondent is a subcontractor that installs exterior insulation finish systems on commercial buildings. Fred Cosenza, a union organizer, contacted Mark Sanders, the Respondent's manager, pursuant to the Respondent's newspaper advertisement seeking laborers, stucco mechanics and carpenters, and arranged an interview for himself and "a couple of guys" on August 16. Cosenza then asked six union organizers, including Kilkenny, to accompany him to the Respondent's jobsite at Children's Hospital in Van Voorhees, New Jersey, in order to apply for jobs.

Upon arriving at the jobsite, Cosenza presented the applicants to Mark and Sun Sanders and asked where they wanted the applicants to start. Sun Sanders asked if any of the applicants knew how to stucco. When Kilkenny responded that he did, Cosenza informed Sun Sanders again that they were ready to work and this time asked her how many men she needed. She responded that she was not ready and that she couldn't hire "all these." Sun Sanders then asked Kilkenny about his stucco experience. After he explained that he had 10 or 11 years of experience, Cosenza urged him to "get up on that wall" and demonstrate his skill. Kilkenny volunteered to get his tools, but stated, "I ain't gonna rasp."[5]

Cosenza first broached the subject of the applicants' union affiliation and intent to organize the Respondent's workplace after Mark Sanders started to give Cosenza his business card. Sun Sanders reiterated that she would let them know and Mark Sanders provided a pad of paper to Cosenza so that the applicants could write down their contact information.

At about that point, Cosenza and Kilkenny asked two on-duty workers about their benefits and wages and solicited them to join the Union. Sun Sanders attempted to interrupt this conversation but Kilkenny then shouted to the employees that the union rate was $24.35 an hour with $7 in pension and annuity. Kilkenny then urged the workers to "[g]ive the Local a call" so that he could arrange for them to work for a union contractor. When Sun Sanders scolded him for doing so, Kilkenny mocked Sun Sanders' Asian accent.

Agitated by the applicants' behavior, Sun Sanders told them that she planned to talk to her lawyer and told them that she did not want to hire them because they were "too smart acting." The Sanders then repeatedly asked the applicants to leave the Respondent's worksite but the applicants refused to do so. Sun Sanders shouted "union piece of shit" and "[g]et the Hell work other place." Still the applicants insisted that they wanted to work for the Respondent, that they were there in response to the advertisement and were willing to start working. Sun Sanders responded, "I'm sure you guys very good," and that she would "let them know." Sun Sanders added that the Respondent was planning to open a "big . . . panel

[1] No exceptions were filed concerning the judge's findings that the Respondent violated Sec. 8(a)(1) by instructing an employee not to discuss his wage rate with other employees and by leaving telephone messages that threatened the same employee because of his union support. In his exceptions, the General Counsel requests an additional 8(a)(1) violation based on these same telephone messages. We need not pass on this request because such additional finding would be cumulative and would not materially affect our Order in this case.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

[4] All dates are in 2000, unless otherwise indicated.

[5] Rasping is a necessary task associated with applying exterior insulation finish systems.

shop," and would hire "lotta people" and "[m]ight go for union so you never know." The Respondent did not thereafter contact any of the applicants or offer them jobs and did not hire Kilkenny when he later applied again on October 3, 2000, at the Respondent's jobsite in Berlin Township, New Jersey.

The judge found that the General Counsel failed to meet his initial evidentiary burden under *FES*[6] of proving that union animus was a motivating factor in the Respondent's decision not to hire Kilkenny or consider him for hire on August 16 or October 3. Specifically, the judge did find that the Respondent harbored union animus, as exhibited by Sun Sanders' use of the antiunion expletive referenced above. The judge found, however, that such animus did not contribute to the Respondent's refusal to hire or consider Kilkenny for hire.

Rather, the judge credited Mark Sanders' testimony that he did not hire Kilkenny because the group came "onto my jobsite, and was basically ordering us around," and engaged in behavior that was not "appropriate," and that Kilkenny intentionally misunderstood Sun Sanders' speech, "making her look like a dummy." According to Mark Sanders, the group as a whole was "intimidating us," and Kilkenny "was going right along with them." The judge also credited Sun Sanders' testimony that she felt the applicants treated her like "a stupid woman." Citing *Heiliger Electric Corp.*,[7] the judge found that the Respondent refused to hire Kilkenny or consider him for hire because he and the other applicants created an "intimidating" and "disrespectful" environment at the jobsite.

Moreover, the judge found that even if the General Counsel had proven that union animus contributed to the Respondent's decision not to hire or consider Kilkenny for hire on August 16 or October 3, the Respondent satisfied its burden of showing that it would have made the same decision absent Kilkenny's union affiliation. Specifically, the judge found that the Respondent proved it would not have hired Kilkenny or considered him for hire due to the "disruptive, intimidating, and disrespectful" atmosphere created by the applicants on August 16. The judge found it "not surprising" that Sun Sanders did not forget or forgive that behavior when Kilkenny applied again on October 3.

The General Counsel and the Charging Party contend, inter alia, that there was no credible evidence that the applicants' activity was disruptive. They argue that the applicants were engaged in protected activity when they solicited the on-duty workers to join the union and engaged them in discussion about wages and work. The General Counsel and the Charging Party further contend that the Sanders' antiunion animus, as evidenced by the Respondent's failure to give the organizers applications and by the Sanders' statements to the applicants, was the true motive for the decision not to hire or consider Kilkenny for hire.

Based on the credited evidence, we agree with the judge that the conduct of Kilkenny and the other applicants was "disruptive" and "disrespectful." Moreover, based on the judge's crediting of the testimony of Mark and Sun Sanders as to their reaction to this conduct, we adopt his finding that the Respondent would not have hired or considered Kilkenny for hire regardless of his union activity.[8]

As the Board explained in *Heiliger Electric Corp.*, supra, "there is no provision in the Act or in the law developed by the Board that would require an employer to . . . [be] subjected to rude or intimidating conduct."[9] Kilkenny and the other applicants behaved in precisely such a manner toward the Sanders at the Respondent's jobsite and, by doing so, effectively eliminated their opportunity for employment by the Respondent. That they also engaged in union activity by stating their intent to organize the Respondent's employees if hired does not require the Respondent to disregard their misconduct.

We therefore affirm the judge's dismissal of the discriminatory refusal to hire and refusal to consider for hire allegations.[10]

2. The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) when Sun Sanders told Kilkenny on October 3 that she could not hire him because he worked for the Union office. The facts relating to this allegation are briefly as follows. Kilkenny called Feeley, an out-of-work plasterer and union member, on August 16, after leaving the Respon-

[6] *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[7] 325 NLRB 966 fn. 3 and 968 (1998) (finding that union applicants' creation of a "sufficiently intimidating and disrespectful" environment "privileged a decision by [the employer] to not hire the . . . applicants").

[8] We assume arguendo that the Respondent harbored antiunion animus, as the judge found. However, because we find that the Respondent would not have considered or hired Kilkenny in any event, we find it unnecessary to pass on the judge's alternative findings as to whether or not the Respondent's action was motivated by animus. Member Cowen would adopt the judge's conclusion that the Respondent's decision not to hire Kilkenny was not motivated by union animus.

[9] 325 NLRB at 968.

[10] We unanimously agree that assuming, arguendo, the General Counsel has established his initial burden under *FES*, the Respondent has satisfied its rebuttal burden of showing that it would not have hired Kilkenny or considered him for hire despite his union affiliation. However, we write separately to address our differing individual views on the burdens of proof associated with the issue of applicant status under the *FES* framework. These differing views have no impact on the disposition of this case.

dent's Van Voorhees jobsite, and directed him to apply with the Respondent. Feeley contacted the Respondent and was hired on that same day after meeting with Sun and Mark Sanders. After the Respondent hired Feeley, Kilkenny told Feeley to contact him if he learned that the Respondent was hiring employees.

In mid-September, the Respondent advised Feeley that it was hiring plasterers. Subsequently, Feeley informed the Sanders that he knew someone who was interested in the position. On October 3, Feeley and Kilkenny arrived together at the Respondent's Berlin Township jobsite and Feeley introduced Kilkenny to Sun Sanders. Sun Sanders stated that she recognized Kilkenny from his visit on August 16 and would not employ him. She also stated that she could not employ him because he worked for the Union office. Kilkenny then asked if Feeley also could not work for the Respondent because he was a Union member. Sun Sanders replied that Feeley could continue working for her because "it's a free country." The Respondent did not contact Kilkenny after his visit to the jobsite.

The judge found that given the context of Sun Sanders' statements, what she actually meant was that she would not hire Kilkenny due to his rude and disruptive behavior during his August 16 visit to the Respondent's jobsite, not because of his union affiliation. According to the judge, a reasonable applicant who, like Kilkenny, was cognizant of the surrounding facts would understand what Sun Sanders meant.

The General Counsel argues that the Board should reject the judge's interpretation of Sun Sanders' statements. In the General Counsel's view, the credited testimony demonstrates what was actually said and does not support the judge's interpretation. For the reasons that follow, we find merit in this argument.

An employer violates Section 8(a)(1) by making statements to employees that union applicants will not be hired.[11] Such statements are clearly coercive and have a reasonable tendency to interfere with employees' rights under the Act.[12] The Board has also held that "the supervisor's motive or intent in making the statement has no relevancy in an 8(a)(1) context."[13] Instead, "the test to determine if a supervisor's statement violated Section 8(a)(1) is whether under all the circumstances the supervisor's remark reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act. It is well established that this test does not depend on motive or the successful effect of the coercion."[14]

We do not rely on the judge's interpretation of Sun Sanders' statements. Even if we were to agree with the judge that Sun Sanders did not actually mean what was said, and that Kilkenny understood the context in which the statements were made, the judge does not properly account for the fact that Sun Sanders made this statement to Kilkenny in front of Feeley, a current employee. There is no indication that Feeley was familiar with Kilkenny's August 16 behavior. Under these circumstances, Sun Sanders' statement would reasonably tend to restrain, coerce, or interfere with employees' exercise of rights guaranteed under the Act, regardless of her intent or motive in making the statement. Her clear words to Kilkenny which were communicated in front of Feeley—that she would not hire him because he worked for the Union office—would reasonably tend to restrain, coerce, or interfere with employees' rights in violation of Section 8(a)(1). There is nothing ambiguous about her statement and what Sun Sanders may have really meant in making it is beside the point.

The judge found it significant that Sun Sanders "did not state, or imply, that she would consider Kilkenny for hire if he abandoned his union affiliation or activity, or took some other action, nor did she suggest that Feeley would have to do anything, or refrain from doing anything, if he wished to continue to work for the Respondent." The absence of these additional statements, however, provides no defense for the Respondent. Sun Sanders' statement is not rendered innocuous simply because she did not make these additional statements, which would have also been unlawful. We therefore find that Sun Sanders' statement that she would not hire Kilkenny because he worked for the Union office is a violation of Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exterior Systems, Inc., Mount Laurel, New Jersey, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(c) and reletter the subsequent paragraph:

"(c) Threatening that applicants who are union organizers will be refused employment."

[11] *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1999); see also *GM Electrics*, 323 NLRB 125, 126 (1997); *Sunland Construction Co.*, 311 NLRB 685, 704 (1993); *J.L. Phillips Enterprises*, 310 NLRB 11, 13 (1993).

[12] *Lin R. Rogers Electrical Contractors*, supra at 1167.

[13] *GM Electrics*, 323 NLRB at 127.

[14] Id.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., November 22, 2002

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Wilma B. Liebman, Member

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William B. Cowen, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

In line with the careful allocation of evidentiary burdens under *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), the Respondent has demonstrated that notwithstanding its antiunion animus, it refused to hire union organizer James Kilkenny, and refused to consider him for hire, because of his disruptive and disrespectful conduct, not his union affiliation. Despite our agreement on this point, Member Cowen and Member Bartlett have each chosen, in concurring opinions, to address an issue that was neither raised nor briefed by any party and that we concededly need not examine here. My colleagues separately argue that the Board must supplement or modify the *FES* framework in some fashion, to address what each apparently believes should be an element of a refusal-to-hire and a refusal-to-consider violation under Section 8(a)(3) of the Act. In their view, the General Counsel has the burden of proving that the employee alleged to have been discriminated against also had a genuine interest in employment—however that may be defined and demonstrated (my colleagues do not articulate a clear and common test). Member Cowen would require this showing as part of the General Counsel's initial burden; Member Bartlett would not, but he would still place the burden of persuasion on the General Counsel, once the employer produced evidence on the issue (as opposed to treating the matter as an affirmative defense, on which the employer bears the burden of persuasion).

Needless to say, these arguments would be better addressed in a case where they had some bearing on the outcome and where the Board had the benefit of briefing. But because my colleagues have put their views forward, because those views strike me as seriously flawed, and because I am the sole remaining member of the Board that decided *FES*, I feel compelled to speak to the issue as well. In my view, *FES* clearly contemplates that the issue of an applicant's interest in employment will be material only insofar as the employer can establish, as an affirmative defense, that the applicant's behavior or manifested lack of interest in employment, was the actual basis for refusing to hire or consider him. As this case illustrates, the *FES* framework effectively permits employers whose actions were not, in fact, based on their proven antiunion animus to defend against claims involving applicants whose own behavior belies a serious intention to secure employment.

The basic principles underlying *FES* are well established. It is settled that a job applicant is an "employee" under Section 2(3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).[1] It is settled, too, that union organizers who apply for work (salts) are also statutory employees, immediately protected from discrimination based on their union affiliation—unless it is proven that they have engaged in (or, if hired, would engage in) acts of disloyalty or other conduct inconsistent with the duties of an employee. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).[2] Apart from employee status, there is no other status—such as being a "genuine applicant"—that must be established to claim the protection of the Act. Statutory employees, in turn, may not be discriminated against. When antiunion animus was a substantial motivating factor in an employer's adverse actions toward an employee, it is the employer's burden to prove that it would have acted in the same way, regardless of the employee's union affiliation. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Board's decision in *FES* is a particularized application of *Wright Line*. There, after hearing oral argument, a full Board set forth a new analytical framework

[1] The Court explained in *Phelps Dodge* that discrimination in hiring on the basis of union status was one of the chief obstacles to collective bargaining through self-organization and that removal of such obstructions was a driving force behind the enactment of the Act. 313 U.S. at 186. As the Court stated:

> [The Act] leaves the adjustment of labor relations to the free play of economic forces but seeks to assure that the play of those forces be truly free . . . . Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which is recognized as basic to the attainment of industrial peace.

Id. at 183–185.

[2] The Court held that the language of the Act "is broad enough to include those company workers whom a union also pays for organizing" and that the Board's "broad literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting the rights of employees to organize for mutual aid without employer interference," and "encouraging and protecting the collective-bargaining process." 516 U.S. at 91.

for deciding discriminatory refusal-to-hire and refusal-to-consider cases. The *FES* Board was able to strike a balance in determining not only the requisite legal elements of refusal-to-consider and refusal-to-hire violations, but also the respective burdens of the parties, as well as the stage of the case at which issues are to be litigated. The Board took a middle course, as reflected by its rejection of the positions expressed in the concurring and dissenting opinions for then-Members Brame and Fox. Although the *FES* Board did not explicitly address the issue raised by my colleagues, the decision's careful crafting obviously implies an intention to resolve all such issues. I see no reason to tinker with the resulting framework. Contrary to my colleagues, I believe that under current law, the Board can and does appropriately address situations where salts are not pursuing legitimate objectives using legitimate means. Such situations strike me as the exception, not the rule.

My colleagues suggest that their approaches are consistent with, or even compelled by, *FES*. I disagree. The Board was well aware of the "genuine applicant" issue when it decided *FES*. Member Brame's concurrence—in which he expressed his own view that the standard for hiring discrimination cases must take into account "whether the alleged discriminatee actually sought work with the employer," 331 NLRB at 26—was not endorsed by the majority. At the same time, the majority's opinion made clear that it did "not address affirmative defenses to allegations of discriminatory refusal to consider or to hire applicants for employment and [did] not affect precedent governing such defenses." 331 NLRB at 12 fn. 6.

FES, then, teaches that an applicant's lack of interest in employment, however manifested to the employer, may be raised by way of an affirmative defense, i.e., to establish that the employer, notwithstanding its antiunion animus, had a lawful reason for excluding the applicant from the hiring process. In other words, the employer may show that it honestly believed that the applicant was not interested in being hired, or that, in the employer's view, the applicant's behavior during the application process demonstrated his unfitness as an employee, *and* that this was the actual reason he was not hired or considered for hire. Just what evidence will satisfy the employer's burden is necessarily a question to be decided case-by-case, because it involves an inquiry into the motives of a particular employer in particular circumstances.

FES does not support—indeed, it does not permit—the positions respectively taken by my colleagues. "Applicant status," as my colleagues describe it, is not an element of the violation and is not an issue on which the General Counsel bears the burden of persuasion. Certainly, *FES* assumes that the General Counsel can show that the alleged discriminatee applied (or attempted to apply) for a position. But there is nothing in the decision to suggest that this means anything more than that the employee has submitted an application or otherwise conveyed a desire to be hired.[3]

None of the other cases cited by my colleagues offer the claimed support for their views.[4] *Sunland Construction Co.*, 309 NLRB 1224 (1992), was decided before *FES* and *Town & Country Electric*.[5] Member Cowen describes the decision as addressing "the applicant/employee status of paid organizers." But he cites only a footnote in which the Board rejected the argument of the amici "that paid union organizers are not '*employees*.'" 309 NLRB at 1229 fn. 35 (emphasis added). *Sunland* did not require the General Counsel to prove "applicant status"; it held, rather, that an employer could refuse to hire a paid organizer who undeniably did seek employment, but who did so while his union was on strike—circumstances, the Board held, that established a disabling conflict of interest for the organizer. In *Blaylock Electric*, 319 NLRB 928 (1995), enfd. 121 F.3d 1230 (9th Cir. 1997), also decided before *FES*, the Board denied an employer's application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), following the General Counsel's withdrawal of the complaint after the trial in that case. The Board concluded that the General Counsel's position was substantially justified. In a footnote, it rejected the employer's argument "that the alleged discriminatees were not bona fide applicants for employment." 319 NLRB at 928 fn. 1. Clearly, that issue was material to the EAJA claim only insofar as it would support the employer's affirmative defense in the underlying case. Finally, *HVAC Mechanical Services*, 333 NLRB No. 24 (2001), decided after *FES*, used the phrase "genuine applicants" and "bona fide applicant" in describing the respondent employer's arguments, which it rejected. The decision nowhere suggests that the General Counsel bore the burden of proof

[3] *FES* does not clearly speak to situations where a potential applicant takes no steps to apply because the employer has prevented him from doing so or has otherwise made applying futile.

[4] The Board's pre-*FES* decision in *Arrow Flint Electric Co.*, 321 NLRB 1208 (1996), meanwhile, is at odds with my colleagues' approaches. There, the Board pointed out that the employer's unlawful conduct in discharging a union organizer before he could begin work made it impossible to determine whether he "actually intended to carry out his stated intent of working." 321 NLRB at 1209. Had the burden of proof been on the General Counsel, of course, no violation could have been established.

[5] I have suggested elsewhere that *Sunland Construction* cannot be easily reconciled with *Town & Country Electric*. See *Aztech Electric Co.*, 335 NLRB No. 25, slip op. at 11 (2001) (concurring opinion of Members Liebman and Walsh).

on this point. Had the Board intended to depart from the *FES* framework, it surely would have said so.

The shared flaw in the views of Member Cowen and Member Bartlett is a focus not on the employer's motive in refusing to hire or consider a statutory employee, but on the intentions of the employee with respect to actual employment. A job applicant without the right intentions, in their view, is not really an applicant at all and so cannot be the victim of discrimination. At bottom, then, my colleagues seek a way around the Supreme Court's decisions in *Phelps Dodge* and *Town & Country Electric*, by effectively creating a new prerequisite for employee status.

Such attempts are at odds with the Act and its policies. Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Quite clearly an employer may discriminate against an applicant for employment, in violation of Section 8(a)(3), even if the applicant has no intention of accepting the job if offered and even if the applicant hopes to be rejected.[6] Consider an employer whose consistent policy is not to hire union members, in order to prevent organization of the work force. Following that policy, the employer will reject any union member who applies, regardless of whether the applicant has a genuine interest in obtaining employment. (Indeed, the employer may be entirely unaware of the applicant's lack of interest.) The employer's conduct was motivated solely by antiunion animus, discriminated against union members, and necessarily discouraged union membership. It furthers the goals of the Act to detect and redress such discrimination.[7]

In contrast, treating "applicant status," as my colleagues describe it, as an element of an 8(a)(3) violation, creates an obstacle to the effective enforcement of the Act. Union members may wish to test their employability—whether for purely personal reasons or as a means of exercising their Section 7 rights, by uncovering antiunion animus and pursuing legal relief—regardless of any present intention of accepting a particular job. Should their efforts produce evidence of unlawful discrimination, there is no reason why the Board should fail to intervene.

Ensuring that the Act protects all persons entitled to protection means assuming, at least initially, that all applicants are genuine unless and until proven otherwise. Member Cowen argues that the "Board should not assume that salts intend to obtain employment, when many times . . . they intend to provoke the employer into not hiring them so that they can file unfair labor practice charges." But based on my experience at the Board, I cannot subscribe to Member Cowen's dire description of the practice of salting and its effect on the administration of the Act. The change in our law that Member Cowen proposes would, I fear, discourage the prosecution of many legitimate refusal-to-consider and refusal-to-hire cases, in order to spare the Board from considerably fewer problematic cases.

Somewhat obscured by my colleague's rhetoric is a point on which we both agree: the Board's scarce resources should not be wasted on cases of little value in promoting the goals of the Act. But unlike Member Cowen, I see no "rising tide of cases" involving abusive behavior by salts, no persuasive evidence that the Board's processes are being "co-opted" by unions, and nothing in current law that encourages the General Counsel to pursue meritless salting cases. Presumably if an employer has persuasive evidence that an applicant was not genuine, and that fact explains the employer's actions**,** it will present that evidence to the Region during the precomplaint investigation. I am inclined to confidence that the General Counsel does not often issue complaints in such cases.

There is no question that salting cases represent a significant part of the Board's docket. I am not persuaded that this development reflects an abuse of process. What strikes me, rather, is the energetic effort of at least some employers to avoid considering or hiring union-affiliated applicants, whatever the cost in litigation expenses or backpay remedies. Whether or not this is common practice in the construction industry, it would help explain the rise and persistence of salting campaigns.

Dated, Washington, D.C., November 22, 2002

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Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, concurring.

I agree with my colleagues that the Respondent established that Kilkenny's misconduct was the basis for the Respondent's decision not to hire or consider him for hire and therefore the Respondent did not violate Section 8(a)(3) and (1). However, I would also dismiss these complaint allegations on another basis; that is, Kilkenny's offensive conduct establishes that he was not an

[6] Compare *Kyles v. J.K. Guardian Security Services*, 222 F.3d 289, 300 (7th Cir. 2000) (finding "no support in Title VII for a requirement that a job applicant must have a bona fide interest in working for a particular employer if she is to make out a prima facie case of employment discrimination").

[7] What relief is appropriate, of course, is another question.

applicant for employment and therefore the General Counsel did not establish a prima facie case under *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). In this significant respect, my position differs from that of both of my colleagues.

Kilkenny and the group of organizers with whom he associated revealed through their antics during their job interview with the Respondent on August 16, that they were not genuinely interested in obtaining employment, but were simply at the jobsite to provoke the Respondent into not hiring them so that a spurious unfair labor practice charge could be filed. Kilkenny's offensive and disruptive behavior during the job interview included urging on-duty workers to leave the Respondent's employment and go to work for a union contractor, making fun of the owner's Asian accent, and refusing to leave the jobsite despite repeated requests by the Respondent to do so. After this display, which was captured covertly on audiotape by the organizers, the Union then had the audacity to file an unfair labor practice charge on Kilkenny's behalf, alleging discriminatory failure to hire and failure to consider for hire. In my view, this case strongly illustrates a significant problem that may result when the Board is not attendant to the *FES* requirement that an alleged discriminatee is in fact an applicant. By ignoring this requirement, the Board may unwittingly allow its processes to be co-opted in a union's illegitimate and unprotected effort to inflict substantial expenses on targeted nonunion employers who fail to voluntarily recognize the union.

A. FES Requires the General Counsel to Prove Applicant Status

A claim of discrimination *in regard to hire* requires that there be an applicant who was denied employment. Accordingly, inherent in the *FES* framework is the requirement that an alleged discriminatee be "an applicant." Specifically, with regard to a refusal-to-hire claim, the General Counsel must show, inter alia, "that the *applicant* had experience or training relevant to the announced or generally known requirements of the positions for hire . . ." and that "antiunion animus contributed to the decision not to hire the *applicant*."[1] With regard to a refusal to consider for hire claim, the General Counsel must show that the respondent "excluded the *applicant* from the hiring process" and that "antiunion animus contributed to the decision not to consider the *applicant* for employment."[2]

[1] *FES*, 331 NLRB at 12 (emphasis added).
[2] Id. at 15 (emphasis added).

The Board's decision in *FES* did not address the standard for determining applicant status. However, looking to Board precedent, the Board has instructed that the intent to obtain work with the employer is a necessary prerequisite to obtaining applicant status. Significantly, the Board, in its 1992 decision of *Sunland Construction Co.*, considered the applicant/employee status of paid organizers and found that "as long as the organizer is able, available, and fully intends to work for the employer if hired, he will not be disqualified from 'employee' status."[3] Because *FES* did not overrule this precedent, it must be incorporated into the Board's examination of applicant status in refusal to hire cases under *FES*. Consistent with this precedent, in a post-*FES* case, *HVAC Mechanical Services*, 333 NLRB No. 24 (2001), the Board found that the alleged discriminatees were "genuine applicants" because there was no evidence that "they were not interested in obtaining employment with the Respondent, or that they did not intend to perform their assigned duties if hired."[4] The reason for this genuine intent requirement is simple: an individual cannot suffer a denial of employment that he or she never actually sought. Therefore, it is clear that a discriminatory hiring violation cannot be established unless there is proof that the alleged discriminatee genuinely sought work with the employer.

Consistent with these principles, administrative law judges have issued findings in numerous post-*FES* cases as to whether alleged discriminatees were bona fide applicants.[5] In most of those cases, the judges have consid-

[3] *Sunland Construction, Inc.*, 309 NLRB 1224, 1229–1230 fn. 35 (1992) (emphasis added).

[4] 333 NLRB No. 24, slip op. at 1 (2001); accord: *Blaylock Electric*, 319 NLRB 928 fn. 1 (1995), affd. 121 F.3d 1230 (9th Cir. 1997) (finding that the alleged discriminatees were "bona fide" applicants). In citing to these decisions, I do not pass on the Board's findings as to the applicant status issue in those cases.

[5] See, e.g., *B&C Contracting Co.*, 334 NLRB No. 25, slip op. at 15 fn. 76 (2001) (judge dismissing refusal-to-hire claim on alternative basis but noting that had he reached respondent's defense that the organizer-applicants were not "bona fide," he would have agreed with respondent because the applicants' resumes were collected by the union "with little or no input from the named applicants regarding their sincere interest in working for the Respondent" and none of the "applicants" testified at the hearing); *Eckert Fire Protection, Inc.*, 332 NLRB No. 18, slip op. at 24, 26–27 (2000) (judge finding that alleged discriminatees were not bona fide applicants because, inter alia, they applied based on an instruction to do so by a union official, did not follow up on their applications, had as their primary goal the filing of unfair labor practice charges, and testified that they would have only "considered" going to work for the respondent if selected for hire); *Hartman Bros. Heating & Air Conditioning*, 332 NLRB No. 142, slip op. at 6 (2000), enfd. 280 F.3d 1110 (7th Cir. 2002) (judge finding that an organizer-applicant was not a bona fide applicant because, inter alia, he "rushed off" to file an application immediately after another organizer was sent home from work by the respondent, provided information in

ered evidence regarding the intent of the organizer-applicant at the time of application. However, the Board has typically sidestepped the applicant status issue by failing to pass or rely on these findings.[6] In one such case, *Eckert Fire Protection, Inc.*, Judge Shamwell aptly explained the importance of alleged applicants being able to show that they were genuinely interested in obtaining work with the employer in light of the underlying policies and remedial nature or the Act:

> Clearly, one of the broad purposes and functions of the Act, as amended, is to protect the statutory rights of employees, but also in the process those rights must be balanced against the rights of employers. It is also the policy of the Act to promote labor peace and reduce burdens on commerce occasioned by labor strife. In light of these policies and the remedial nature of the Act, applicants for employment in my view should be bona fidely interested in gaining employment when they submit applications, even where they also harbor an intention from whatsoever source derived to organize or engage in other protected activities if hired. In my view, it is also consonant with the spirit of the Act that such applicants should demonstrate that their applications were submitted in a good-faith attempt to secure employment and not for purposes that run counter to the policies of the Act.[7]

The Board's failure to articulate clear guidance in this area has resulted in a rising tide of cases in which union salts have behaved in a hostile, disrespectful, and/or intimidating manner during the application process with a clear purpose of inducing the employer not to hire them so that they could file unfair labor practices with the Board.

In order to make out a prima facie case of discrmina-tory refusal to hire, or refusal to consider for hire, in my view, *FES* requires the General Counsel to show that the alleged discriminatee applied for a position under the terms held out by the employer to the public, with a genuine interest in gaining employment with the employer, regardless of a concomitant interest in engaging in lawful organizing. In my view, the crucial inquiry is whether the alleged discriminatee *actually intended to gain employment* regardless of the motivation for doing so. In other words, regardless of the applicant's particular reason for wanting the job, whether it be to obtain better pay, a better work schedule, or to organize the employer's workforce, the applicant must have a genuine intent to work for the employer under the same terms generally offered to all applicants. In this vein, the intent to work for the employer if hired is distinguishable from the desire to organize or any other motivation that the alleged discriminatee may possess.

Evidence of an alleged discriminatee's conduct during the application process is relevant to the determination of whether he or she is an applicant. This includes whether an alleged applicant engages in offensive behavior inconsistent with a genuine intent to obtain employment.[8] Evidence of this character strikes at the very core of the General Counsel's prima facie case. For example, no one would argue that an individual who throws an application attached to a rock through an employer's window is in fact an applicant. Accordingly, where an alleged discriminatee behaves in an objectively offensive manner that is antithetical to how one would expect a genuine applicant to behave, the Board should infer that such an individual is not genuinely interested in employment, and dismiss the allegation on that basis.

It should be noted that nothing in the Supreme Court's holdings in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), and *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), compels a contrary approach. *Phelps Dodge* addressed the question of whether applicants are considered statutory employees under the Act, and *Town & Country* addressed the same question as to paid union organizers. Neither decision addressed the definition of "applicant" under the Act or took away defining applicant status from the Board's province and responsibility.

his application that raised substantial doubts about its legitimacy, and had a track record of filing multitudinous job applications with nonunion employers, working only sparingly when offered jobs, and receiving significant amounts of money in settlement of unfair labor practice charges).

[6] See, e.g., *B&C Contracting Co.*, supra, slip op. at 1 fn. 3 ("In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by failing to accept and consider the February 2 and 3 faxed applications, we find it unnecessary to rely on his statements . . . regarding these applicants' purported lack of bona fides"); *Eckert Fire Protection, Inc.*, supra, slip op. at 1 fn. 4 (expressly declining to pass on the judge's findings that the alleged discriminatees were not "bona fidely interested in gaining employment when they submitt[ed] applications" and instead dismissing the refusal to hire allegations on the basis that the General Counsel failed to establish that the respondents were hiring at the time of the alleged unlawful conduct); *Hartman Bros. Heating & Air Conditioning*, supra, slip op. at 2 fn. 9 (expressly declining to rely on the judge's finding that an organizer-applicant was not bona fide in affirming the judge's dismissal of the complaint and instead relying on the judge's finding that the respondent did not hire him because he was overqualified); but see Id., slip op. at 4 (former Chairman Hurtgen dissenting in part) (agreeing with the judge's finding that the organizer-applicant was not bona fide "because he applied for a job with the Respondent in bad faith" as evidenced by information provided in his application that raised substantial doubts about its legitimacy).

[7] 332 NLRB No. 18, slip op. at 11–12.

[8] *See FES*, 331 NLRB at 27 fn. 68 (former Member Brame concurring).

The *FES* burdens of proof are based on those established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) for all cases alleging violations of Section 8(a)(3), or violations of Section 8(a)(1) turning on employer motivation.[9] Under this burden shifting scheme, the General Counsel must prove by a preponderance of the evidence each and every element of his prima facie case, including applicant status, before the burden will shift to the Respondent to show that it would have taken the same action despite the alleged discriminatee's union affiliation or activity.[10] Accordingly, the requirements of *FES*, consistent with the purposes of the Act, require the General Counsel to prove that an alleged discriminatee is in fact an applicant as part of his prima facie case. This is not to say that the General Counsel must put on extensive evidence to establish a genuine intent to obtain employment in every case. Where an alleged discriminatee's application appears genuine on its face, the employer must present evidence to show that the application was not genuine if the employer wishes to challenge the General Counsel's prima facie case as to the alleged discriminatee's applicant status, *but the ultimate burden of proof remains with the General Counsel.*

The Board should not assume that salts intend to obtain employment, when many times, as is clear in this case, they intend to provoke the employer into not hiring them so that they can file unfair labor practice charges. With such a faulty assumption, the door is left open for salting campaigns to be able to enlist the Board's processes in their efforts to pressure employers into voluntarily recognizing the union and to financially punish uncooperative employers. If the Board is not attendant to the *FES* requirement that the General Counsel prove that the alleged discriminatee is an applicant, the General Counsel will be prompted to issue complaint in such spurious cases, as is evidenced by this case itself.[11] Even if the Board ultimately finds no violation, the union's objective of inflicting financial harm on the employer will be satisfied and the Board will have allowed itself to be used as the means by which this illegitimate and unprotected objective is attained.[12]

In *Jefferson Standard*, the Supreme Court recognized an employer's right to insist on employee loyalty and a cooperative employee-employer relationship. *Jefferson Standard* made clear that even otherwise protected activity ceases to be protected if conducted in an excessive or indefensible manner.[13] In my view, a union's litigation-based strategy of filing unfair labor practice charges, without regard for their merit, for the sole purpose of inflicting serious economic injury on nonunion employers, is unrelated and unnecessary to any legitimate and lawful organizing purpose.[14] This litigation-based tactic undermines the primary purpose of the National Labor Relations Act, which is to eliminate obstructions to the free flow of commerce by resolving labor disputes through peaceful processes.[15] Contrary to this underlying policy, unions who employ this litigation-based salting tactic seek to provoke a labor dispute and cause disruption of commerce. As former Chairman Hurtgen has noted, "although the filing of colorable unfair labor practice charges is protected, [the] filing of spurious charges intended to harass is not protected."[16] The Board must avoid being enlisted in such illegitimate tactics so that it may conserve its limited resources for the adjudication of colorable claims under the Act.

B. Kilkenny Is Not An Applicant

Here, James Kilkenny and the troop of organizers with whom he associated revealed by their insulting, intimidating, and disruptive behavior that they were not interested in obtaining employment with the Respondent. This conduct included disrupting the workplace by shouting to the working employees about their pay and benefits, attempting to persuade them to leave the Respondent's employment and go to work for a union contractor, bullying and insulting the Sanders, and refusing to leave the jobsite after the Sanders repeatedly instructed them to do so. It is abundantly clear from this record that the organizers were not acting with the objec-

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[9] *FES*, 331 NLRB at 12 ("This framework for analysis appropriately allocates the *Wright Line* burdens in a refusal-to-hire case.").

[10] *FES*, 331 NLRB at 12.

[11] Here, the General Counsel not only issued a complaint but also filed exceptions—in the face of an audiotaped record and other credited evidence of the alleged discriminatee's egregious misconduct—to the judge's finding of no refusal to hire or consider for hire violation.

[12] See *FES*, 331 NLRB at 29, 30 (former Member Brame concurring) (advising the Board to take care not to be "co-opted" by salts who employ the "ill-advised" tactic of "submit[ting] applications in the hope of being rejected so that they can file unfair labor practice charges with the Board and inflict legal expenses on the targeted employer in retaliation for its failure to recognize the union.")

[13] *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 474–475 (1953).

[14] See *Aztech Electric Co.*, 335 NLRB No. 25, slip op. at 16–17 (2001) (former Member Truesdale concurrence) (finding that IBEW's practice of filing unfair labor practice charges, without regard to their merit, for the destructive purpose of inflicting serious economic injury on nonunion employers was unrelated to the organizing of nonunion forces and was unprotected); Id., slip op. at 18–19 (former Chairman Hurtgen dissent) (finding that where a union's purpose is simply to injure and punish an employer for its nonunion status, conduct in pursuit of that goal is unprotected).

[15] 29 U.S.C. § 151.

[16] *Aztech Electric Co.*, supra, slip op. at 19 fn 2 (former Chairman Hurtgen dissent) (citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983)).

tive of getting hired. The only reasonable interpretation of their actions is that they intended to provoke the Respondent not to hire them so that the Union could file a spurious unfair labor practice charge.

Accordingly, I would find that the General Counsel failed to show by a preponderance of the evidence that Kilkenny was an applicant, and therefore failed to make out a prima facie case of discrimination under *FES*.

C. Conclusion

Accumulated experience has demonstrated the merit in prior warnings that the Board's processes are being hijacked by salting campaigns in pursuit of illegitimate union objectives that are foreign to the policies the Act is designed to promote. The Board's past refusal to seriously address these concerns has cost this Agency dearly in lost credibility with reviewing courts and with the public. Valid hiring discrimination cases may be rejected by the courts of appeal because they are viewed with an unwarranted skepticism flowing from the Board's handling of spurious claims made in salting cases. The Board has devoted precious administrative resources to cases of this character, at the expense of more promptly addressing other cases that do present the problems Congress created this Agency to address.

To remedy this problem, the Board should expressly decide, as is inherently required under *FES*, whether the General Counsel has proven as part of his initial evidentiary burden that the alleged discriminatee was in fact an applicant; that is, someone who applies for a position under the terms held out by the employer to the public, with a genuine interest in gaining employment with the employer, regardless of a concomitant interest in engaging in lawful organizing. Where the alleged discriminatee's words or conduct during the hiring process are inconsistent with an intent to seek employment, the case should be dismissed forthwith.

Dated, Washington, D.C., November 22, 2002

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William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER BARTLETT, concurring.

Our holding today that an employer may refuse to consider or hire applicants who engage in disruptive, intimidating and disrespectful behavior represents an important step in addressing the issue of inappropriate tactics employed by many job applicants in salting campaigns. However, the type of conduct that Kilkenny and the other union organizers engaged in here is only one way that an "applicant" can demonstrate a lack of bona fides in seeking employment. Approaching the matter more generally, I would find, consistent with *FES*,[1] that the General Counsel must prove that the alleged discriminatee is an applicant for employment with the respondent. In this regard, I would require the General Counsel to prove initially that the individual applied for a position. I would not require the General Counsel to prove in all cases, as part of the prima facie case, that the individual applied for a position with a genuine interest in gaining employment with the respondent. However, if the respondent in its case produced evidence that the individual was not a bona fide applicant, I would require the General Counsel to rebut this evidence. Thus, from the outset and throughout the case, I would find that the ultimate burden to prove this element of the violation resides with the General Counsel.

A. Analytical Framework

The Board's analytical framework for allegations involving discriminatory refusal to hire or consider for hire is set out in *FES*, supra. In that case, the Board held that, in order to establish a discriminatory refusal to hire, the General Counsel must first show

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position, or, in the alternative, that the employer has not adhered to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.[2]

In cases alleging a discriminatory refusal to consider for hire, the General Counsel must show

> (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.[3]

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[1] *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[2] *FES*, 331 NLRB at 12.

[3] Id. at 15.

The burden-shifting framework delineated in *FES* applies by its terms both to cases alleging a refusal to hire and to those involving a refusal to consider for hire. Indeed, the statutory basis for undertaking the analysis is the 8(a)(3) prohibition against "discrimination in regard to hire." Although not articulated in the Board's decision, *FES* presupposes that the target of the alleged discrimination presented himself to the respondent as an applicant for a job. An individual cannot be discriminated against by being denied employment that he does not actually seek.

For these reasons, I would find that *FES* implicitly and necessarily requires the General Counsel to establish that the individual applied or attempted to apply for work.[4] Typically, the General Counsel's burden as to this issue would be satisfied by evidence that the alleged discriminatee submitted a job application to the respondent or appeared at the respondent's workplace and requested hire. In rare cases, when the General Counsel's evidence showed lesser measures to secure employment, or that the individual's efforts were thwarted by the respondent, the Board would be required to evaluate on a case-by-case basis the reasonableness of the individual's actions to determine whether the required showing has been met.

Moreover, not every individual who submits an application or requests to be hired has a real interest in working for the employer. An alleged "applicant" might simply go through the motions of applying for reasons totally unrelated to a desire to secure and perform an available job. For example, a laid-off employee might demonstrate to the employer that he is grudgingly applying for a job in order to maintain eligibility for unemployment compensation. Obviously, an employer is not obligated to offer a job to an individual who conveys a lack of genuine interest in employment.

Section 8(a)(3) requires no different result where the applicant supports or is affiliated with a union. Thus, an employer does not discriminate in refusing to hire an applicant on the basis of union affiliation if the applicant informs the employer that he does not want to work for the employer or is not interested in the available job. Of course, such explicit expressions of lack of interest are the exception. More commonly, an individual demonstrates through less direct statements or through his behavior that he is not interested in the job at issue. Reason dictates that at some point such statements or conduct may also convey to the employer that the individual has effectively removed himself from consideration for employment and thus that he is not a bona fide applicant.

In articulating the test in *FES*, the Board did not identify the bona fides of an applicant as a discrete element of either the General Counsel's or the respondent's case. Nevertheless, other Board decisions make clear the relevance of such an inquiry. For example, in *Blaylock Electric*,[5] the Board agreed with the judge that the alleged discriminatees were bona fide applicants. The Board explained its finding of bona fide applicant status, noting that although the applicants were currently employed at higher wage rates, the record showed that they anticipated being laid off soon, and that their testimony about being unwilling to accept jobs with the employer pertained only to short-term jobs. Similarly, in *HVAC Mechanical Services*,[6] the Board rejected the respondent's assertion that the alleged discriminatees were not bona fide applicants, finding that "[t]here is no evidence in the record to support the Respondent's speculation that [the applicants] were not interested in obtaining employment with the Respondent, or that they did not intend to perform their assigned duties if hired."[7]

Although the Board in these cases has recognized the relevance of bona fide applicant status, it has not explicitly addressed the relative burdens of the General Counsel and the respondent on this issue. Thus, the question remains as to which party has the burden of coming forward or producing evidence on the issue and which party has the burden of persuasion. I would find that these burdens are appropriately allocated as follows.

As stated above, the General Counsel initially would have a burden of establishing that the alleged discriminatee is an applicant for employment with the respondent. Consistent with *FES*, this burden would require no more of the General Counsel than to show that the individual applied for or sought a job in the normal sense. The General Counsel need not introduce evidence regarding the alleged discriminatee's intentions or bona fides in seeking employment.

Assuming the General Counsel has presented sufficient evidence that the alleged discriminatee is an applicant, I would shift the burden of going forward with evidence of a lack of bona fides to the respondent. At this stage, the respondent could raise the issue of the individ-

[4] See, e.g., *B&C Contracting Co.*, 334 NLRB No. 25 (2001) (employer did not unlawfully refuse to accept faxed job applications from a group of union supporters where the employer did not receive the applications).

[5] 319 NLRB 928 (1995).

[6] 333 NLRB No. 24 (2001). In citing the Board's consideration of the bona fide applicant issue in that case, I do not pass on the conclusion or its analysis.

[7] In *Hartman Bros. Heating*, 332 NLRB No. 142 (2000), and *B&C Contracting Co.*, supra, the administrative law judges also addressed the applicants' bona fides, but the Board in those cases found it unnecessary to rely on the judge's findings, deciding the cases on other grounds.

ual's status as a bona fide applicant by producing evidence of any conduct or statements by the alleged discriminatee, or other circumstances, that tend to contradict a genuine desire to obtain employment. However, while the respondent would have the initial burden of producing relevant evidence that the applicant was not bona fide, I would allocate the burden of persuasion as to this issue to the General Counsel. Thus, the General Counsel would have the ultimate burden of establishing that the applicant is bona fide. I would find it appropriate to place this burden on the General Counsel because applicant status is an essential element of the alleged violation, and because the General Counsel has access to the alleged discriminatee for purposes of obtaining evidence on this subject.

B. Kilkenny's Status as a Bona Fide Applicant

Applying the above principles to the facts of this proceeding,[8] I would find that the General Counsel produced sufficient evidence that Kilkenny applied for work with the Respondent. However, the Respondent produced evidence that he was not a bona fide applicant. I would find that the General Counsel has not satisfied the burden of establishing that Kilkenny was a bona fide applicant, and that the Respondent therefore did not violate Section 8(a)(3) and (1) by not hiring or considering him for hire.

The General Counsel produced evidence, relied on by the judge, that Kilkenny appeared at the Respondent's jobsites on August 16 and October 3 seeking employment. The record shows that on August 16 Kilkenny presented himself as an applicant for work, and briefly discussed his qualifications with the Sanders. Kilkenny visited the Respondent's Berlin Township, New Jersey jobsite on October 3 with employee Feeley to apply again. Sun Sanders obviously perceived Kilkenny's presence as an attempt to secure work with the Respondent. When Feeley introduced Kilkenny, Sun Sanders promptly stated that she recognized Kilkenny and would not employ him.

Although I would find that the above actions demonstrate that Kilkenny applied for a job with the Respondent, I would further find that the Respondent produced evidence that Kilkenny's conduct during the August 16 visit was inconsistent with any genuine desire to obtain employment. Kilkenny and the other union organizers who arrived together at the Respondent's jobsite attempted from the start to bully Sun and Mark Sanders, ostensibly with the goal of being hired. While it was Cosenza, the group's leader, who began by telling an employee that "we'll probably take your job," criticizing the Respondent's choice of equipment, opining that the employees operating a lift "don't know what they're doing," and taking it upon himself to shout steering directions to them, Kilkenny himself engaged in the unruly and disrespectful conduct toward the Respondent. When Sun Sanders attempted to discuss qualifications for performing stucco work, Kilkenny went along with Cosenza's urging to get his tools and get up on the wall to demonstrate his skill. Kilkenny at first jokingly insisted that he would not perform rasping, a necessary task in plastering work, but later restated his distaste for rasping by recommending that the Respondent "let the guy without the shirt do all the rasping because that stinks." Kilkenny and Cosenza cajoled the Respondent to allow them to begin work immediately, even after the Sanders repeatedly stated that they did not need all of them and that they did not want them that day. Kilkenny disrupted the work of an employee on a lift at the jobsite by shouting questions about his pay and benefits, and encouraging him to come to the office of the local union, promising that "I can put you out tomorrow." He also ridiculed Sun Sanders' accent and "made her look like a dummy," according to Mark Sanders.

This evidence of "disruptive, intimidating, and disrespectful conduct," as characterized by the judge, starkly contradicts Kilkenny's asserted desire to secure a job with the Respondent. No applicant could reasonably entertain an expectation of a job offer after engaging in such a display of inappropriate conduct at a prospective employer's workplace. Instead, I would find that through his blatant misconduct Kilkenny effectively removed himself from consideration for employment by the Respondent, both on August 16 and upon his return with Feeley on October 3. Thus, considering the evidence produced by the General Counsel and the Respondent, I would conclude that the General Counsel has failed to carry his burden of persuasion that Kilkenny was a bona fide applicant. Accordingly, I would dismiss the allegation that the Respondent unlawfully failed to hire Kilkenny or consider him for hire.

Dated, Washington, D.C., November 22, 2002

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Michael J. Bartlett, Member

NATIONAL LABOR RELATIONS BOARD

[8] Although my formulation of the burdens of proof regarding an individual's status as a bona fide applicant was not known to the parties at the time of the hearing in this case, I would find it appropriate to apply that formulation here because the issues regarding the conduct of Kilkenny and his companions, as well as the Sanders, were fully litigated.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT instruct employees not to discuss their wages with other employees.

WE WILL NOT threaten any employee because he or she supports a union.

WE WILL NOT threaten that applicants who are union organizers will be refused employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

EXTERIOR SYSTEMS, INC.

Bruce G. Conley, Esq. and *Lance Geren, Esq.,* for the General Counsel.
Thomas M. Barron, Esq. (Parker, McCay & Criscuolo), of Marlton, New Jersey, for the Respondent.
Bruce E. Endy, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on May 15 and 16, 2001. The Operative Plasterers and Cement Masons International Association of United States and Canada, AFL–CIO, Local 8 (the Union), filed the original charge on October 6, 2000, and the amended charge on December 22, 2000. The Director of Region 4 of the National Labor Relations Board issued the complaint on December 27, 2000. The complaint alleges that Exterior Systems, Inc. (the Respondent), refused to hire and consider for hire James Kilkenny because he is a member of the Union, in violation of Section 8(a)(1) and (3) of the Act. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by, inter alia, disparaging the Union to employees, instructing an employee not to discuss his wages with other employees, interrogating an employee regarding his membership in the Union, and threatening an employee because of his support for the Union. The Respondent filed an answer in which it denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, performs exterior insulation finishing services in New Jersey and Pennsylvania. Its principal place of business is in Mount Laurel, New Jersey.[1] During the year prior to the issuance of the complaint, the Respondent performed services valued in excess of $50,000 outside the State of New Jersey.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a subcontractor that installs exterior insulation finish systems on commercial buildings. This work involves insulating the outside walls of the building, placing a base coat over the insulation and then applying a finish similar to plaster or stucco over the insulation and base coat. Sun Sanders (S. Sanders) and her husband, Mark Sanders (M. Sanders), operate the company, which has been in business for approximately 3 years. S. Sanders is the Respondent's owner and president, and M. Sanders is the Respondent's general manager. During the relevant time period the Respondent employed between four and nine persons in addition to S. Sanders and M. Sanders. The Respondent's work force has never been represented by a union.

August 16, 2000 Incident

In August 2000, the Respondent placed a help-wanted advertisement in a local newspaper. The advertisement read:

> CONSTRUCTION Laborers, stucco mechs & carpenters. Hlth bntfs. Work year-round [Respondent's Telephone Number]

The advertisement was drafted and submitted to the newspaper by M. Sanders based on conversations with S. Sanders. At the time the Respondent employed four or five persons.

Frederick Cosenza, a business representative for the Philadelphia Building Trades Council, and a member of Laborer's Local 332, observed this advertisement, and telephoned the Respondent to inquire about possible employment. He spoke to M. Sanders who informed him that the Respondent was inter-

[1] The record indicates that the Respondent relocated its office from Cinnaminson, New Jersey, to Mount Laurel, New Jersey, on about October 3, 2000.

ested in hiring two mechanics, two laborers, and one carpenter.[2] Cosenza arranged to meet M. Sanders at one of the Respondent's jobsites—the Children's Hospital in Van Voorhees, New Jersey. Cosenza enlisted a number of other persons he knew as union organizers to accompany him to the jobsite and also apply for work.

On August 16, 2000, Cosenza and six other applicants arrived together at the Children's Hospital jobsite. The other applicants were James Kilkenny (organizer and funds collector for the Union), John Simoncini (organizer for the sheet metal workers union), Charles Burkert (organizer for the sheet metal workers union), Robert DiOrio (organizer for the sheet metal workers union), John Kane (organizer for the plumbers union), and Jim Cunningham (organizer for the asbestos workers union).[3] The applicants did not initially identify themselves as persons affiliated with unions, and there is no evidence that they were wearing or displaying any union insignias, emblems, or slogans.

Cosenza spoke briefly to Tom Wilsey—one of the two individuals working for the Respondent at the site. Cosenza told Wilsey "we'll probably take your job—they'll get rid of you." Burkert added "[i]f you're lucky, right?" Cosenza located M. Sanders and introduced himself. S. Sanders was also present. During most of the ensuing conversation, Cosenza was the primary spokesperson for the applicants, although Kilkenny, Burkert, and others also spoke. M. Sanders indicated that he was surprised to see "all" of them, and Cosenza stated that he had the whole crew ready to go. Cosenza stated that he heard that the Respondent had a lot of work and asked "where" the Respondent wanted them "to start." Cosenza said that the applicants were ready to work and S. Sanders responded "but I'm not [ready]," and then said "I can't hire all these."[4] Cosenza stated that the applicants would do "whatever [type of work] you want" and would "work as hard as anybody you got." Cosenza interrupted the discussion to tell M. Sanders that the Respondent was using a mechanical lift that was too big for the work being performed.

S. Sanders asked if any of the applicants knew how to "stucco" and Kilkenny responded that he did. S. Sanders asked Kilkenny how long he had worked with stucco, and Kilkenny answered 10 or 11 years, and identified several companies for which he had worked. Kilkenny stated that he was certified to work with various types of exterior insulation systems. S. Sanders responded, somewhat skeptically, that "[e]verybody talks good when they come here." Cosenza urged Kilkenny to "get up on that wall," apparently meaning that Kilkenny should immediately begin working to demonstrate his skill as a plasterer. Kilkenny offered to go get his tools, but stated "I ain't gonna rasp." Rasping is one of the less desirable, but necessary, tasks associated with applying exterior insulation finish systems.[5]

Although S. Sanders had already stated that the Respondent was not ready to hire the applicants and could not hire all of them, Cosenza asked "[w]hen do we start . . . and what are we getting paid?" S. Sanders stated "I can't hire everyone now." Cosenza said: "Who you gonna hire? Why don't you go with Jimmy [Kilkenny] first." S. Sanders replied "I will let you know." Cosenza persisted, "[p]ut him[, Kilkenny,] on the wall now." Burkert and Kilkenny both said they thought they were going to start work "today," but S. Sanders informed them that they would not be starting that day. Cosenza asked "what are you paying," apparently directing the comment to M. Sanders, and S. Sanders replied that *she* was the boss and that she was not prepared to discuss pay rates. Cosenza interrupted the conversation to state that the employees on the mechanical lift "don't know what they're doing." He then shouted steering directions to the workers on the lift. Burkert indicated that he was a laborer and S. Sanders replied "I don't need a laborer."

M. Sanders began to get a business card for Cosenza and at this point the applicant-organizers first broached the subject of their union affiliations. Cosenza stated, somewhat obliquely, that "before we start work and during lunch time and after work we'll be the best organizers you ever saw." S. Sanders replied "I'm sure you are very good—we'll see what happens." Then Cosenza made the union affiliation explicit, stating, "[o]kay, because we're union organizers, you know that." Sun responded that "everybody talks good as long as you can work." At this point, Cosenza again urged Kilkenny to get his tools and go up on the wall and demonstrate his skills.

Cosenza and Burkert reiterated their intention of engaging in organizational activities, but M. Sanders apparently did not fully comprehend, and asked "[w]hat do you mean organize?" Later S. Sanders stated "I am organized alright." Cosenza explained that "[e]veryone here is a union organizer." S. Sanders stated that "[w]e are not union,"[6] to which Burkert responded

[2] M. Sanders testified that he told Cosenza that he was only interested in hiring one individual. Tr. 354. Cosenza testified that, to the contrary, M. Sanders told him that he wanted to hire two laborers, two plasterers, and one carpenter. Tr. 40. Cosenza testified that he memorialized this in a written note. Id. I found Cosenza more credible than M. Sanders regarding the question of how many persons M. Sanders stated that he was interested in hiring. Cosenza's account is consistent with the wording of the advertisement placed by the Respondent, which states that the Respondent was hiring laborers, mechanics, and carpenters. M. Sanders' testimony that only one employee was being sought is at odds with that wording.

[3] Simoncini made an audio recording of the applicant-organizers' visit to the Children's Hospital jobsite on August 16, and the General Counsel introduced that recording as an exhibit at the trial. See GC Exh. 4. Kilkenny prepared a transcript of the regarding and the General Counsel also introduced that transcript as an exhibit. See GC Exh. 5. My findings regarding what was said during the encounter are based on the credible testimony, as well as on the audio recording and the transcript.

[4] S. Sanders is of Asian descent and speaks English with an accent. See GC Exh. 4, and GC Exh. 5 at p. 16 (S. Sanders states "I am oriental.")

[5] Kilkenny testified that he was joking when he said he would not rasp, and that rasping is something that he does, and would "no doubt" have to do in order to properly install exterior insulation finish systems. I credit Kilkenny's testimony that he was joking when he said that he would not rasp. However, there was no testimony showing that either S. Sanders or M. Sanders was aware that Kilkenny was joking.

[6] Cosenza testified that S. Sanders also said that the company was "staying nonunion." Tr. 52. I do not credit this testimony, which is not corroborated by other credible testimony and is not supported by the audio recording of the conversation, or by the transcript of that re-

"we'll still come here to work," and Cosenza stated that they would "work hard and at lunch and before work . . . try to organize all your men." Cosenza asked, "[y]ou don't have a problem with that?" Explaining his intentions further, Cosenza stated "we'll have an election with your company, whatever" and "[w]e'll take all the men." M. Sanders asked if the applicants were working somewhere now, and Cosenza replied, "[n]o, we're not—I'm here for the ad." M. Sanders asked "[a]re you here to work?" and Cosenza replied "[w]e're here to work and organize." S. Sanders said: "I let you know . . . . You give me your number. You know how to do it, I'll call you." The Sanders did not dispense application forms to the applicants, however, M. Sanders provided a pad of paper to Cosenza so that the applicants could write down their names and contact information. S. Sanders indicated that the Respondent had already hired new workers and did not need "this many people."

At about this point, some of the applicants tried to engage the Respondent's employees, who were on duty, in a conversation about their terms and conditions of employment, and about the prospect of joining a union. Cosenza shouted up to the employees on the mechanical lift, "[y]ou guys . . . ever think about getting in the union?" He asked if the Respondent "pay[s] good." Kilkenny asked the same employees if they had health benefits, pension, and annuity. S. Sanders tried to prevent this conversation, but Kilkenny went on to shout to the employees that the union rate was $24.35 an hour with $7 in pension and annuity. Kilkenny also urged the workers to "[g]ive the Local a call" so that he could arrange a job with a union contractor. These activities by the applicants interrupted the work of the two employees during worktime.[7]

The interactions between the Respondent and the applicants now became less polite. S. Sanders stated that she planned to talk to her lawyer. When Cosenza asked how the Respondent would get in touch with him, S. Sanders replied "I don't want to get in touch with you." M. Sanders said that the applicants could write down their names and numbers. All seven eventually wrote down their names and phone numbers on a pad, which Cosenza returned to M. Sanders. However, when Cosenza asked if the Respondent wanted to hire them, S. Sanders replied "I don't think so." She explained that they were "too smart acting."

Cosenza again stated that "we want to work for you" and that the applicant-organizers were "answering the ad in the paper." At this point, S. Sanders shouted: "I don't need people, alright. Get out of . . . my place." The applicant-organizers did not leave, rather Cosenza stated again that he was answering the advertisement, and S. Sanders again shouted, "[g]et out of here now." The applicants still did not leave, but remained and insisted that they were all present to work in response to the advertisement. S. Sanders scolded Kilkenny for asking the Respondent's employee about wages and for offering to arrange a job for him with another company. According to the transcript that Kilkenny himself prepared, he and S. Sanders had the following exchange:

> S. Sanders: It's none of your business how much he pay—you know how much you paying.
> Kilkenny: How much do I paint? . . . I don't paint, I'm a plasterer.
> # # #
> S. Sanders: You have no manners.
> Kilkenny: I have very well manners.

M. Sanders believed that Kilkenny was "patronizing [his] wife because he knows what she's saying" and was "making her look like a dummy." S. Sanders felt that Kilkenny and other of the applicants were laughing at her and treating her like she was a "very stupid . . . woman." I find that Kilkenny, by intentionally misunderstanding S. Sanders' statement regarding "pay" as a statement regarding "paint"[8] and by mangling his own syntax ("I have very well manners"), was mocking S. Sanders, who is of Asian descent and speaks with an accent.

After S. Sanders told the applicants to leave repeatedly, they still did not depart, but again stated that they were answering the advertisement. S. Sanders shouted "Union piece of shit" and "[g]et the Hell work other place." Cosenza persisted, stating "I want to work for you," and S. Sanders warned him "don't threaten," but no threat was made against her or the Respondent.[9] S. Sanders said: "Life is short. Everybody al-

cording that was submitted as an exhibit by the General Counsel. See GC Exh. 5. Indeed, the recording and transcript show that S. Sanders indicated a willingness to consider becoming a union contractor. See GC Exh. 5, p. 18 (S. Sanders: "We're gonna hire lotta people need it—I let you know guys, not gonna say where. Might go for union so you never know, alright."

[7] M. Sanders testified that the work of the on duty employees was interrupted by the applicant-organizers and there was no credible evidence contradicting this.

[8] Kilkenny understood S. Sanders' comment regarding "pay" well enough to transcribe it correctly in GC Exh. 5, even though he gave the impression of misunderstanding it at the time the conversation took place. Moreover, given the context of the comment, I believe it was clear to Kilkenny that S. Sanders was talking about "pay" not "paint."

[9] During her testimony, S. Sanders stated that Cosenza threatened her by saying "I'm going to get you guys real good," and by pointing at a scaffold and saying "I'm [going to] get that scaffold tonight." Tr. 326–327. She also testified that she told a police officer that Cosenza said that the Respondent was going to "be out of business." Tr. 348. No other witness, including M. Sanders, corroborated S. Sanders' claim that Cosenza made the statement about the scaffold. M. Sanders did state, very imprecisely, that "[s]omeone said something, you know, about we're going to get them or something to that effect." Tr. 362. M. Sanders' testimony regarding this statement was vague and ambiguous and I consider it unreliable. M. Sanders also pointed to the portion of the transcript of the audio recording where Kilkenny states "[g]ive the Local a call, Dude, I can put you out tomorrow." GC Exh. 4; GC Exh. 5 at p. 9. Kilkenny testified that this was not a threat to the Sanders, but rather an offer to find one or more of the employees positions with union contractors. Based on Kilkenny's testimony and the context of the statement, and after listening to the audio recording, I conclude that the statement was an offer to the Respondent's current employees. I find that the applicants made none of the threatening statements recounted by S. Sanders. This is not to say, however, that S. Sanders, who is four feet, nine inches tall and weighs approximately 110 pounds did not feel intimidated and threatened by the seven men who came onto the jobsite and refused her repeated requests to leave, and who told her, inter alia, that they were going to "take all the men."

lowed to work." Cosenza responded "[i]t sounds like you're threatening me."

Cosenza then stated that he came in response to the advertisement to talk about a job, but "as soon as I brought up the union everything changed, why?" S. Sanders said "I don't want to talk about it," and told Cosenza to "talk to my lawyer." Cosenza asked if the Respondent's "lawyer hire[d] everybody," and S. Sanders, no longer shouting, said "[w]e'll let you know." Kilkenny stated that "we're very qualified," and Cosenza said "[w]e're willing to get up on the wall and start." S. Sanders said "I'm sure you guys very good," and that she would "let them know." M. Sanders stated that the Respondent was going to hire one person at a time. S. Sanders added that the Respondent was planning to open a "big . . . panel shop," and would hire "lotta people" and "[m]ight go for union so you never know." Kilkenny asked if the Respondent would call to inform him whether or not he was hired, and M. Sanders agreed to do so. The conversation ended.

During the exchange between the applicants and the Sanders, Thomas Wilsey, a plasterer working for the Respondent at the jobsite, became concerned that the applicant-organizers were causing a disturbance and notified the police using a cell phone that the Respondent kept at the jobsite.[10] After the conversation between the applicants and the Sanders ended, but before the applicants left the jobsite, a number of officers of the Voorhees Township Police Department arrived. Officer Thomas Lynch spoke with M. Sanders who told him that Cosenza had acted in a threatening manner. Officer Lynch was concerned about his own safety, in part because he believes that labor disputes are prone to become violent. As a precaution, Officer Lynch told Cosenza to empty his pockets and place his hands on a car, and then Officer Lynch performed a "pat down" search of Cosenza's person. No weapon was found. Officer Lynch did not make any arrests, but encouraged the applicants to leave the jobsite, which they did.

The Respondent did not contact any of the applicants to offer them jobs or to tell them that they were not being offered jobs.

[10] The complaint alleges that S. Sanders called the police. Wilsey testified credibly that he was the one who made the call to the police and that he did so on his own initiative, not based on any instruction received from S. Sanders or M. Sanders. S. Sanders also testified that Wilsey placed the phone call to police and did so on his own initiative. Wilsey was a very clear, direct, and credible witness. He no longer works for the Respondent, or even in the exterior insulation field, and was not shown to have any motive to give biased testimony. Officer Lynch first stated that M. Sanders was the one who had called for the police, and that he believed that M. Sanders confirmed this at the scene. Tr. 189, Tr. 190, Tr. 204. Later, Officer Lynch stated that he thought it might have actually been S. Sanders, not M. Sanders, who placed the call for the police. Tr. 210. Officer Lynch's confusion is not surprising given that he was not the one who received the telephone call. Rather he was informed by a police dispatcher that a call had been received from the site. I consider Officer Lynch's testimony regarding the identity of the person who placed the call to be unreliable. Not only did he contradict himself—first stating that it was M. Sanders and then that it was S. Sanders who placed the call—but his testimony was, at best, uncorroborated hearsay. Whatever probative weight his testimony on this subject might have is outweighed by the more reliable testimony of Wilsey.

Employment of Edward Feeley

Later on August 16, Kilkenny spoke to Edward Feeley, an out-of-work plasterer who was an apprentice in the Union.[11] Kilkenny told Feeley that the Respondent was hiring and that he should apply. That same day, Feeley contacted the Respondent by telephone and met in person with S. Sanders and M. Sanders. Feeley completed an application and discussed his qualifications. Neither S. Sanders nor M. Sanders asked Feeley anything about unions; however, during the interview Feeley volunteered that he had worked for the union, but that the union had been unable to provide him with steady work. The Respondent hired Feeley, and he started work the next day at the Children's Hospital jobsite. After the Respondent hired Feeley, Kilkenny told Feeley to let him know when the Respondent was seeking new employees. Within 30 days after August 16, the Respondent also hired Les Throckmorton as a laborer. During that same 30-day period the Respondent also hired Dave Zelvis, who worked for the Respondent for 1 day and did not return.

After S. Sanders and M. Sanders observed Feeley at work, they set his pay at $18 per hour. They informed Feeley that his rate of pay was higher than that of other employees and told him not to discuss his wage rate with anyone else. Feeley did not discuss his wages with any of the other workers during the period of his employment with the Respondent.

One or 2 weeks after Feeley started working for the Respondent, S. Sanders approached Feeley during lunch and asked if he still had a union card, and Feeley said that he did and kept it current. Then Sun asked Feeley if he was going to "stay" with the Respondent. Feeley told her that he "would stay as long as . . . they had work."

Feeley Refers Kilkenny

Feeley worked for the Respondent for approximately 7 weeks and by all accounts the Respondent was satisfied with his work and had a good working relationship with him. During the time he was employed by the Respondent, Feeley never tried to engage the Respondent's other employees in organizational activities.

In mid-September, S. Sanders told Feeley that the Respondent needed to hire one or more new employees. Subsequently, Feeley informed S. Sanders and M. Sanders that he knew someone who was interested in a position. They asked about the individual's skills and Feeley answered that the person he had in mind possessed skills that were equal, or superior, to Feeley's own. The applicant Feeley had in mind was James Kilkenny, who was one of the applicant-organizers who met with the Sanders on August 16, and the person who had informed Feeley that the Respondent was hiring plasterers.

On the morning of October 3, 2000, Feeley and Kilkenny arrived together at the Respondent's jobsite in Berlin Township, New Jersey. Feeley and Kilkenny traveled together in Kilkenny's vehicle. Both had work clothes with them, but neither was wearing the work clothes out of concern that they might soil Kilkenny's vehicle, which was new. Feeley introduced

[11] Feeley subsequently completed the apprenticeship program in November 2000.

Kilkenny to S. Sanders. S. Sanders stated that she recognized Kilkenny from the August 16 incident and said that she would not employ him. She stated that she could not hire him because he worked for the Union office. Then Kilkenny asked if Feeley also could not work for the Respondent because he was in the Union too, and S. Sanders said that Feeley could continue working for her because "it's a free country." Kilkenny handed S. Sanders a copy of a union pamphlet that, inter alia, discussed the wages earned by plasterers who worked for union contractors. There was no discussion of Kilkenny's qualifications or of wage rates.[12] Kilkenny was not contacted by the Respondent after his visit to the jobsite.

During the 30-day period beginning on October 3, 2000, the Respondent hired Michael Colston as a plasterer, and Steven Jones and Adam Whitaker as laborers. The Respondent was aware that Colston was a member of the Union.

Phone Messages Left for Feeley

After the meeting between Kilkenny and S. Sanders on October 3, Kilkenny departed the jobsite. Feeley left with Kilkenny because the two came in Kilkenny's vehicle and Feeley did not have another means of returning home. That afternoon, Feeley received three recorded phone messages from S. Sanders and one from M. Sanders. In the first message, S. Sanders called Feeley a "spy," and told him that her lawyer was going to call him and that she could have him arrested.[13] She said "goes around and comes around" and "I get you very soon." In the third phone message, S. Sanders stated:

> Ed, I know where you are living, alright? . . . You are spy. You are too young for spy. Goes around and comes around. Alright, Ed? We'll see you later and see what's gonna happen.

M. Sanders left a message, in which he stated:

> I never thought that you were that kind of person to come out and spy for the Union . . . . You should be ashamed of yourself. I figured you and the Union would have better things to do than this. Okay, our lawyer will be contacting you and the Union. . . . And thanks for the work and thanks for helping us out for the last several weeks—appreciate it. I guess you were just there to drag our business down."

M. Sanders testified that he did not actually intend to have a lawyer contact Feeley, and only said "our lawyer will be contacting you," because he was upset about Feeley's activity in support of the Union.

When Feeley left the Respondent's jobsite with Kilkenny it was his intention to continue working for the Respondent. However, Feeley considered the phone messages to be threats of physical violence and he was not comfortable about returning to work for the Respondent. He never did so. Feeley subsequently visited the Sanders to have his final paycheck signed. Feeley testified that he brought a friend with him when he did this because "I had no idea . . . if I was walking into anything." S. Sanders signed the check and Feeley and his friend left without incident.

B. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act, by discriminatorily refusing to hire Kilkenny, or consider him for hire, on two occasions because Kilkenny was a member of the Union. The complaint further alleges that the Respondent violated section 8(a)(1) by: disparaging the Union to employees and calling the police regarding the presence of the applicant-organizers; instructing an employee not to discuss wages with other employees; interrogating an employee about his union membership; telling an employee/applicant that it would not hire him because the applicant worked for the Union and the Respondent does not "hire union"; and, threatening an employee with unspecified reprisals and arrest because the employee supported the Union and accusing the employee of being a "spy for the Union."

Analysis

I. KILKENNY: FAILURE TO CONSIDER AND FAILURE TO HIRE

The complaint alleges that because Kilkenny was a member of the Union, the Respondent unlawfully failed to consider him for employment, or to hire him, since about August 16, 2000, and again since about October 3, 2000. Complaint paragraphs 7(a)–(c). In *FES*, 331 NLRB 9 (2000), the Board set forth the framework for analyzing both refusal-to-consider allegations and refusal-to-hire allegations. In order to establish a discriminatory refusal-to-consider violation, the General Counsel must show: (1) that the respondent excluded the applicant from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment. *Wayne Erecting, Inc.*, 333 NLRB No. 149, slip op. at 1 (2001) (citing *FES*, supra). If the General Counsel makes these showings,

[12] S. Sanders testified that Kilkenny told her that she had to pay him the union rate of approximately $37 per hour. Tr. 336. I credit Kilkenny's and Feeley's contrary testimony that there was no discussion of wage rates. Tr. 139, Tr. 267. I did not find S. Sanders a credible witness regarding the October 3 incident. Her testimony was not only contrary to the credible testimony of Feeley, but also at times contrary to other portions of her own testimony. Cf. Tr. 339 (S. Sanders states that after Feeley showed up with Kilkenny "I was very pissed off, very mad."), and Tr. 343 (S. Sanders denies that she was mad or angry when Feeley brought Kilkenny to the jobsite).

[13] The messages were recorded on a voice mail system. Feeley and Kilkenny played the recorded voice mail messages over a speakerphone system and made a tape recording. As memorialized on that tape recording, the portion of the message that Feeley says mentioned possible arrest is very distorted and cannot be understood. However, I found credible Feeley's testimony that this portion of the original voice mail message was clearly audible and that it included a statement by S. Sanders that she could have Feeley arrested. In general, I found Feeley a credible witness. His testimony was direct and he did not seem disposed to evade questions or to slant his testimony to favor either side in the dispute. Although he testified for the General Counsel, Feeley gave some testimony that he must have known was favorable to the Respondent's case. For example, he testified that during his interview with the Sanders he volunteered that he had worked for the union, and that the Sanders nevertheless hired him the same day. Although Feeley is a union member, he is not an employee of the Union, or a professional organizer, and by all accounts while employed by the Respondent he performed his work well and had an amicable work relationship with the Sanders.

then the burden shifts to the Respondent to show that it would not have considered the applicant even in the absence of the applicant's union activity or affiliation. In order to establish a refusal-to-hire violation, the General Counsel must show: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, on in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Id. If the General Counsel makes these showings, then the burden shifts to the Respondent to show that it would not have hired the applicant even in the absence of the applicant's union activity or affiliation.

I turn first to the claim relating to Kilkenny's attempt to apply on August 16, 2000. M. Sanders described the Respondent's general hiring process as beginning with an interview that focuses on the applicant's experience and prior employers. "Most of the time," M. Sanders stated, "we get back to them" and say "we would like to have you come out [and] work . . . for a day." Then, according to M. Sanders, if the individual "likes us and we like" them, a rate of pay for continuing employment is negotiated. Feeley testified credibly that when he applied, the Respondent had him complete an application.

I conclude that the General Counsel has shown that the Respondent refused to consider Kilkenny when he applied on August 16. The Respondent declined to provide an application form to Kilkenny, but later that day provided one to Feeley. Although the Respondent permitted Kilkenny to write his name and phone number down, and although M. Sanders agreed to inform Kilkenny whether he was hired or not, no one from the company ever contacted Kilkenny. The Respondent did not ask Kilkenny to work for a 1-day trial period even though M. Sanders testified that the Respondent usually does that, and even though Kilkenny had extensive relevant experience. It is true that S. Sanders asked Kilkenny a few questions about his skills and experience, however, she and M. Sanders excluded Kilkenny from subsequent stages of the consideration process.

Regarding the second element of a refusal-to-consider claim, I conclude that while the record establishes that the Respondent bears some animosity towards unions, the General Counsel has failed to show that this animus contributed to the decision not to consider Kilkenny for employment on August 16. That the Respondent bore at least some antiunion animus is established beyond any serious doubt by the fact, not denied by the Respondent, that S. Sanders' shouted "union piece of shit" at Kilkenny and the other applicant-organizers during the encounter on August 16. At the time she made this statement, S. Sanders was clearly agitated by the behavior of the applicants. However, the fact that, once she lost her composure, S. Sanders directed her vitriol at unions, rather than at the particular applicants or some other target, shows that the Respondent bore animus towards unions.

While the record establishes that the Respondent had some hostility towards unions, I nevertheless conclude that the General Counsel has failed to show that either Kilkenny's union affiliation or his union activity were among the reasons for the denial of consideration. It is clear that the Respondent became less than enthusiastic about hiring these particular applicants, including Kilkenny, well before the applicants revealed their union affiliation. Early in the encounter Cosenza stated that he had the whole crew ready to work, and S. Sanders replied "but I'm not [ready]," and told Cosenza she could not hire "all these." When Cosenza urged the Respondent to hire Kilkenny first and that he start working immediately, S. Sanders, said "I will let you know." When Kilkenny described his relevant skills, S. Sanders expressed doubt, stating that "[e]verybody talks good." Burkert said he was a laborer and S. Sanders replied "I don't need a laborer," even though the help-wanted advertisement mentioned laborers. Burkert said "[w]e come here to work," and S. Sanders replied "I don't need it." Cosenza pressed on and S. Sanders said "I'm sure you are very good—we'll see what happens." Burkert and Kilkenny both said they were under the impression that they would start work that day, but S. Sanders informed them that they would not be starting that day. These exchanges took place before the applicants revealed their union status. Based on the testimony and the tape recording of the meeting, I believe that S. Sanders was trying to politely turn the applicants away even before she knew that any of them were affiliated with unions. This conclusion is also supported by the evidence of the very different treatment that Feeley received when he applied later that day. Feeley was offered employment at his initial meeting with S. Sanders and M. Sanders. There was no evidence that the Sanders ever delayed consideration of Feeley's application by telling him that they were "not ready," that they did not need someone with his skills, that they would "let him know" or that they would "see what happens." The difference in the treatment received by Feeley and that received by the seven applicant-organizers who applied earlier that day cannot be reasonably attributed to antiunion animus since the Sanders knew that Feeley was a union member when they hired him, but at the time of the comments recounted above did not yet know that Kilkenny and the other applicants were affiliated in any way with unions.

If antiunion animus did not account for the Respondent's refusal to consider Kilkenny, then what did cause it? My consideration of the testimony and the tape of the August 16 meeting leads me to conclude that the Respondent refused to consider Kilkenny because of the disruptive, intimidating, and disrespectful conduct of Kilkenny and the group of applicants with whom he associated himself. It is not clear to me that intimidation was an objective of any of the applicant-organizers, or whether they were merely behaving with what they viewed as tenacity and good humor. Regardless of the applicants' intentions, I conclude that reasonable persons in the Sanders' positions would have felt that they were being bullied.[14] The Respondent is a small company, employing only four or five workers total at the time the seven applicants arrived together at

[14] Indeed, as discussed below, M. Sanders testified that such behavior was the reason he was not interested in hiring Kilkenny. In addition, on August 16, S. Sanders told the applicant-organizers that she did not want to hire them because they were "too smart acting."

the jobsite on August 16. Almost immediately upon arriving, Cosenza exhibited a cavalier attitude towards the prospective employer, criticizing the Respondent's decision to use a particular mechanized lift for the job, stating that the Respondent's employees on the lift "don't know what they're doing," shouting steering directions to the Respondent's employees, and telling one of the Respondent's workers that "we'll probably take your job." When S. Sanders stated that she was not ready to hire any of the individuals immediately, and could not use all of them, Cosenza essentially ignored her, asking "[w]hen do we start? . . . and what are we getting paid?" After S. Sanders resisted, Cosenza attempted to unilaterally designate Kilkenny for immediate hire and urged Kilkenny to "get up on that wall," although no representative of the company had invited Kilkenny to begin working. Kilkenny offered to get his tools, but stated that he would not "rasp," despite the fact that he knew that rasping was an essential duty of the job for which he was applying. It is not at all surprising that M. Sanders viewed the applicants as disrespectful and undesirable before they ever revealed their union affiliation. If union applicants create an environment that is "sufficiently intimidating and disrespectful" it "privilege[s] a decision by [the employer] to not hire the . . . applicants." *Heiliger Electric Corp.*, 325 NLRB 966, fns. 3 and 968 (1998). I believe that Kilkenny and the other applicants created such an environment in this case and that this was the reason that the Respondent refused to consider Kilkenny.

After the applicants made clear that they were union organizers and that one of their objectives was to organize the Respondent's work force, the applicants' cavalier behavior toward the Respondent continued. M. Sanders testified that Kilkenny intentionally misunderstood his wife's speech and "ma[de] her look like a dummy." As discussed above, I believe that Kilkenny did have some fun of this kind at the expense of S. Sanders who speaks English with an accent. S. Sanders testified credibly that she felt that the applicants treated her like "a stupid woman," and made her "feel down . . . like on the ground." In addition, Cosenza and Kilkenny began shouting questions to the two on duty workers at the jobsite and Kilkenny invited them to talk to him about leaving the Respondent to work for a union contractor.[15] These activities interrupted the work of the employees during worktime, and there was no evidence that such interruptions were tolerated when they pertained to matters unrelated to union activity.[16] One of the workers, Wilsey, found the applicant-organizers so disruptive that he decided to telephone the police.

The conclusion that antiunion animus did not contribute to the Respondent's refusal to consider Kilkenny for hire is also lent some support by the fact that the Respondent hired Feeley on the same day that it rejected Kilkenny even though the Respondent knew that Feeley had been working as a union plasterer. Moreover, Feeley stated that during the time he was employed by the Respondent he had good working relationships with both S. Sanders and M. Sanders despite the fact that they knew he was a union member who possessed a union card and kept the card current. There was no evidence that the Respondent ever treated Feeley in an unfavorable manner because of his union membership, or that it ever attempted to convince him to relinquish his membership.[17]

I conclude that Kilkenny's insulting behavior, and the intimidating and disrespectful behavior of the group of applicants of which he was a part, were the reasons for the Respondent's refusal to consider Kilkenny, and that antiunion animus did not contribute to the decision.

I recognize that S. Sanders made the statement "union piece of shit" during the very encounter on August 16 at which Kilkenny was turned away. However, in light of the totality of the evidence, I conclude that this is insufficient to show that antiunion animus was a factor contributing to the refusal of consideration. Not only does it appear that S. Sanders was not disposed to hire the applicants before she found out about their union status, but later that same day she and M. Sanders gave a warm reception to another applicant even though he identified himself as someone who had been working as a union plasterer. Given this, and the other evidence discussed above, the General Counsel has failed to establish that the Respondent violated the Act when it refused to consider Kilkenny on August 16.

Had I concluded that antiunion animus contributed to the decision not to consider Kilkenny for employment beginning on about August 16, the burden would have shifted to the Respondent to show that it would not have considered Kilkenny even in the absence of his union activity or affiliation. See *Wayne Erecting*, supra. M. Sanders denied that he turned Kilkenny

[15] See *Clinton Corn Processing Co.*, 194 NLRB 184 (1971) (employee of a third party was not engaged in protected activity when he attempted to induce the employees to leave a respondent and work for union contractors); but compare *Arlington Electric*, 332 NLRB No. 74, slip op. at 8–9 (2000) (employee who solicits employees to work for a union-contractor/competitor engaged in protected activity where he was attempting to induce the employees to seek higher wages and better working conditions and where he brought new employees to the company).

[16] The General Counsel notes that M. Sanders testified that he talked to Feeley at work about M. Sanders' brothers and their membership in the Union. However, the record does not show that these conversations ever interrupted work.

[17] The General Counsel notes that the Board has stated that an "employer's failure to discriminate against all applicants" affiliated with a union does not "negate[] a finding of unlawful motivation," against another union applicant. GC Br. at pp. 36–37. I agree that the Respondent's decision to hire a known union member instead of Kilkenny does not, on its own, negate the possibility that Kilkenny was unlawfully denied consideration. See *H.B. Zachry Co.*, 332 NLRB No. 110, slip op. at 6 (2000). This is particularly true because Kilkenny, unlike Feeley, indicated that he was not only a Union member, but a Union member who intended to engage in organizational activities. However, the hiring of Feeley, as well as the treatment he received from the Respondent prior to October 3, provides at least some support for the view that the Respondent was not basing hiring decisions on union membership as alleged in the complaint. I note that this is not a case where the Respondent hired numerous plasterers after Kilkenny was rejected and one or two of them happened to have some connection to unions. Just one plasterer was hired by the Respondent when Kilkenny was denied consideration on August 16, and that was Feeley—a known union member. This evidence would not on its own have tipped the balance in the Respondent's favor, and, indeed, I would have found that the General Counsel failed to carry its burden even if the Respondent had not known that Feeley was a union plasterer.

away based on union status, and explained that he was not interested in hiring Kilkenny because the group came "onto my jobsite, and was basically ordering us around," and engaging in behavior that was not "appropriate." Tr. 366.[18] M. Sanders stated that he felt intimidated, "like maybe this was Fred Cosenza's business, not our business." Cosenza "was the one telling . . . the other fellows there, you know, you start working now here . . . I thought it would [be] our decision whether we hired that particular person." Tr. 362–363. He testified that the group as a whole was "intimidating us," and Kilkenny "was going right along with them" as "part of the group." Tr. 384. To put it succinctly, M. Sanders felt that Kilkenny and the other applicants were bullying him. I found this testimony credible based on M. Sanders' demeanor and testimony and on the record as a whole.

I conclude that even assuming *arguendo* that antiunion animus contributed to the decision not to consider Kilkenny, the evidence shows that the Respondent would have made the same decision based on the intimidating and impolite behavior of Kilkenny and the group of applicants with whom he applied in the absence of Kilkenny's union activity or affiliation. In reaching this determination, I am persuaded by M. Sanders' credible testimony, as well as by Kilkenny's insulting treatment of S. Sanders, Kilkenny's statement that he would not "rasp," the disruptive, intimidating, and disrespectful atmosphere created by the seven union applicants, the fact that the Respondent was unenthusiastic about hiring the applicants before they revealed their union status, and the fact that a known union plasterer was considered and hired the same day that Kilkenny was turned away.

For essentially the same reasons, I conclude that the General Counsel failed to show that the Respondent violated the Act by refusing to consider Kilkenny for hire when he tried to apply on October 3, 2000, at a jobsite in Berlin Township, New Jersey. Here again, the evidence established that the Respondent denied Kilkenny consideration. S. Sanders turned Kilkenny away without permitting him to complete an application, participate in an interview, or work for a 1-day trial period. The evidence also shows that the Respondent had not jettisoned its antiunion animus. Later on October 3, M. Sanders left a message with Feeley's answering service calling him a union "spy," and scolding him for assisting the Union. I conclude, however, that the Respondent's animus was not the reason S. Sanders refused to consider Kilkenny for employment on October 3. When Kilkenny applied for employment, S. Sanders recognized him from their previous encounter on August 16, 2000. Although Kilkenny did not reprise the behavior that led the Respondent to deny him consideration on October 3, it is not surprising that S. Sanders did not forget or forgive that behavior when Kilkenny applied again less than 2 months later. Shortly after turning Kilkenny away on October 3, the Respondent hired Michael Colston—a plasterer who M. Sanders knew was a union member. I conclude that the disruptive, insulting, and intimidating behavior of Kilkenny and the group of applicants with whom he associated himself on August 16 was the reason that Kilkenny was refused consideration for employment on October 3, and that the Respondent's antiunion animus played no part in that decision.

In arriving at this conclusion, I am given some pause by the fact that during the October 3 encounter, S. Sanders stated that she could not hire Kilkenny because he worked for the Union office. However, that statement, taken in context, falls short of showing that antiunion animus was actually a factor in the decision not to consider Kilkenny. During the exchange on October 3, S. Sanders also stated that she recognized Kilkenny from the August 16 incident and that she would not employ him. When Kilkenny asked if Feeley was also disqualified from working for the Respondent because he was in the Union, S. Sanders said that Feeley could continue to work for the Respondent because "it's a free country." The totality of the evidence leads me to conclude that what S. Sanders, whose command of the English language is somewhat limited, meant was that she was still unwilling to hire Kilkenny because of his behavior when applying with the other union organizers on August 16. It is clear that she did not mean that persons affiliated with unions could not work for the Respondent since she told Kilkenny that Feeley could continue to work for the Respondent even though he was a Union member.[19]

Turning to the refusal-to-hire claim, I conclude that the evidence presented easily satisfies the General Counsel's burden regarding the first two elements of a violation. The Respondent has not denied that it was attempting to hire a plasterer on August 16. Indeed, Feeley was hired when he applied later that very day, and the Respondent had placed a newspaper advertisement seeking applicants. The record also leaves no doubt that the Respondent was hiring when Kilkenny applied on October 3. M. Sanders had told Feeley that the company needed to hire one or more employees and Feeley brought Kilkenny to the jobsite after telling the Respondent that he would do so. Within 30 days of when Kilkenny was rejected on October 3, the Respondent hired a plasterer and two laborers. The General Counsel has also satisfied the second element of its initial burden by showing that Kilkenny possessed experience and training relevant to the requirements of a plasterer position with the Respondent. Kilkenny had over 10 years of experience as a plasterer. He taught in the Union's apprenticeship program and had installed the types of insulation systems used by the Re-

[18] The General Counsel's unopposed motion to correct the transcript, dated June 27, 2001, is hereby granted and received into evidence as GC Exh. 16. The Charging Party also moved to make two corrections to the transcript requested by the General Counsel. CP Br. at fns. 5 and 6. The Charging Party's unopposed motions are granted.

[19] Even assuming that antiunion animus contributed to the Respondent's refusal to consider Kilkenny on October 3, I would still find that this refusal did not violate the Act, since the evidence shows that the Respondent would have made the same decision absent Kilkenny's union status and activity. I base this on the totality of the evidence, including Kilkenny's insulting treatment of S. Sanders on August 16, his statement that he would not "rasp," the disruptive, intimidating, and disrespectful behavior of the group with which Kilkenny previously applied, the indications that the Respondent was less than enthusiastic about the seven applicant-organizers on August 16 even before they revealed their union affiliation, and the fact that both times Kilkenny was rejected the Respondent hired plasterers who it knew were affiliated with the Union. See, supra fn. 17.

spondent many times. The Respondent concedes that it planned to hire a plasterer and that Kilkenny had the experience and training necessary for the job. R. Br. at 8.

The General Counsel stumbles when required to show that antiunion animus contributed to the Respondent's decision not to hire Kilkenny on August 16 and October 3. Instead, the record leads me to conclude that the Respondent's decision to deny Kilkenny employment was based on the behavior of Kilkenny and the other applicant-organizers with whom he applied on August 16. See *Heiliger Electric Corp.*, 325 NLRB at 966 fns. 3 and 968 (intimidating and disrespectful atmosphere created by union applicants privileges employer not to hire the applicants). I am persuaded by the same evidence previously discussed: Kilkenny's insulting treatment of S. Sanders; Kilkenny's statement that he would not "rasp"; the disruptive, intimidating, and disrespectful attitude of the applicant-organizers as a group; the fact that the Sanders were unenthusiastic about the applicant-organizers before the applicant-organizers revealed their union affiliation; and the fact that both times Kilkenny was rejected the Respondent hired a person it knew was affiliated with the Union.

Even were I to conclude that the General Counsel showed that antiunion animus was a contributing factor in the Respondent's decision, I would still conclude that there was no violation, since the evidence discussed above shows that the Respondent would have made the same decision based on the disruptive, intimidating, and disrespectful behavior of Kilkenny and the group of applicants with whom he applied on August 16, absent Kilkenny's union activity or affiliation.

For the reasons discussed above, I conclude that the allegations that the Respondent's refusals to consider and hire Kilkenny were based on union membership in violation of Section 8(a)(1) should be dismissed.

2. S. Sanders' remarks to Kilkenny on October 3, 2000

The General Counsel alleges that the Respondent violated Section 8(a)(1) on October 3, 2000, when S. Sanders told an employee-applicant (Kilkenny) that she would not hire him because he worked for the Union and the Respondent did not hire union. (Complaint par. 5(d).) I credited Feeley's testimony that S. Sanders made statements similar to these. In addition, I found that S. Sanders told Kilkenny that she recognized him from the August 16 incident and said that she would not employ him. During the same exchange Kilkenny asked if Feeley was also prohibited from working for the Respondent because he was in the Union, and S. Sanders replied that Feeley could continue to work for the Respondent if he wished because "it's a free country."

An employer violates Section 8(a)(1) by making statements to employees that union applicants will not be hired. *Sunland Construction Co.*, 311 NLRB 685, 704 (1993); *J.L. Phillips Enterprises*, 310 NLRB 11, 13 (1993). As noted above, I believe that S. Sander's allegedly unlawful statements, when viewed in context, meant that Kilkenny was being rejected because of the behavior on August 16, not because of his union affiliation. Indeed, I believe that a reasonable applicant, who, like Kilkenny, was cognizant of the surrounding facts, including the incident on August 16, would understand that this was what S. Sanders meant. S. Sanders' statement does not, in my view, suggest an element of coercion or interference with Section 7 rights. S. Sanders did not state, or imply, that she would consider Kilkenny for hire if he abandoned his union affiliation or activity, or took some other action, nor did she suggest that Feeley would have to do anything, or refrain from doing anything, if he wished to continue to work for the Respondent. I conclude that, under the circumstances, the allegation regarding S. Sanders statement to Kilkenny on October 3, 2000, should be dismissed.

3. Disparaging the union

The General Counsel also alleges that the Respondent violated Section 8(a)(1) when S. Sanders said "union piece of shit" to the applicant-organizers on August 16, 2000. (See complaint par. 5(a)(i).) In order to establish such a violation, the General Counsel must show that the remark would tend to interfere with the free exercise of employee rights under the Act. See *American Freightways Co.*, 124 NLRB 146, 147 (1959). I conclude that the General Counsel has failed to establish a violation. The offensive remark was made to the applicant-organizers at a point when S. Sanders had become exasperated with their behavior and unwillingness to leave the jobsite. The Respondent did not prove that the statement was overheard by either of the current employees who were at the jobsite.[20] There was no evidence that any other remarks disparaging unions were made either to current employees or to the applicant-organizers. I conclude that the isolated remark, made to professional union organizers,[21] was mere "name calling" and did not rise to the level of a violation of the Act. See, e.g., *Circuit-Wise, Inc.*, 306 NLRB 766, 788, (1992); *Mademoiselle Knitwear*, 297 NLRB 272, 278 (1989); see also *Sears, Roebuck & Co.*, 305 NLRB 193 (1991) ("Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).").[22] Therefore, I conclude that the allegation that S. Sanders disparaged the Union to employees in violation of Section 8(a)(1) should be dismissed.

4. The police call

The General Counsel also alleges that the Respondent violated Section 8(a)(1) when S. Sanders called the police regarding the presence of the seven union applicant-organizers at the jobsite on August 16, 2000. (Complaint par. 5(a)(ii).) How-

[20] Although Wilsey, one of the two employees at the jobsite, was a witness at the hearing, he did not testify that he heard the remark.

[21] The U.S. Supreme Court has held that professional organizers, when applying, are considered statutory employees. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). Nevertheless, the fact that the statutory employees to whom S. Sanders directed the remark were professional organizers is relevant to the question of whether that remark would reasonably tend to interfere with the exercise of rights under the Act. I believe that professional organizers would view the isolated remark as "name calling" and would not reasonably tend to be interfered with or coerced by it.

[22] The Respondent argues that S. Sanders' "union piece of shit," remark is protected employer speech under Sec. 8(c) of the Act. R. Br. at 6–7. Since I conclude that the remark was isolated name-calling that does not rise to the level of a violation of Sec. 8(a)(1), I need not consider whether Sec. 8(c) protects antiunion profanity of this kind.

ever, as discussed above, the credible evidence did not establish that S. Sanders or any other agent of the Respondent called the police or directed any employee to call the police. Rather the evidence showed that the call to the police was made by the Respondent's employee, Wilsey, on his own initiative because he was concerned that the encounter between the seven union applicant-organizers and the Sanders was becoming dangerous. Since the record does not show that the call to the police was made by an agent of the Respondent, or at the direction or suggestion of such an agent, I conclude that this allegation should be dismissed.

5. Feeley instructed not to discuss wages

The General Counsel alleges that the Respondent violated Section 8(a)(1) when S. Sanders instructed Feeley not to discuss his wages with other employees. (Complaint par. 5(b).) The Board has held that discussing compensation is "an inherently concerted activity clearly protected by Section 7 of the Act." *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), enfd. 977 F.2d 582 (6th Cir. 1992). Thus an employer violates Section 8(a)(1) by prohibiting employees from discussing their salaries, since such conduct "has a natural tendency to restrain them in the exercise of their Section 7 right to learn about and assess such a vital term and condition of employment as the salaries paid by their employer." Id. Consistent with the importance of wages as a condition of employment, the Board has held that, absent an overriding business justification, an employer policy against employees discussing their wages is unlawful even if the employer only "requests" that employees follow it, and even if the policy is not, in fact, heeded by employees. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993). Such rules are unlawful regardless of whether the employees are represented by a union or are engaged in organizational activity. *Automatic Screw Products Co.*, supra (quoting *Triana Industries*, 245 NLRB 1258 (1979)).

The credible evidence established that the Respondent told Feeley not to discuss his wage rate with anyone else. Imposing such a prohibition on Feeley restrained him from participating in "an inherently concerted activity." The Respondent has forwarded no overriding business justification that would justify such interference with employee Section 7 rights. The Respondent's witnesses did not explain why Feeley was told not to discuss his wages, but in its brief the Respondent states that "[f]rom the context, it is clear that the reason for the request was to avoid controversy about Mr. Feeley's high wages." R. Br. at 11. This explanation is merely another way of stating that the prohibition on discussion of Feeley's wages was designed to prevent employees from engaging in the protected activity of learning about and assessing their wages. I conclude that the Respondent violated Section 8(a)(1) when, on about August 18, 2000, it prohibited Feeley from discussing his wages with other employees.

6. Interrogation of Feeley

The General Counsel alleges that the Respondent unlawfully interrogated Feeley in violation of Section 8(a)(1) when, after Feeley had worked for the Respondent for 1 or 2 weeks, S. Sanders approached him during lunch and asked whether he still had an active union card and whether he intended to continue working for the Respondent. (Complaint par. 5(c).)

A question is not coercive simply because it concerns an employee's union status. "'Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights.'" *Rossmore House*, 269 NLRB 1176, 1177 (1984) (quoting *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980)), enfd. sub nom. *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "'To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.'" Id. Among the factors considered in determining whether an interrogation is unlawful are the background of the questioning, the nature of the information sought, the identity of the questioner, the place and method of the questioning, Id. at 1178 fn. 20, and whether the person being questioned is an open union adherent, Id. at 1177–1178.

In this case, I conclude that S. Sanders' questioning of Feeley did not "suggest an element of coercion or interference," and was not violative of Section 8(a)(1). In planning its hiring and deciding what projects to accept, the Respondent would reasonably need to determine who among its current workers would likely be available to work on those projects. This is especially vital information for an employer that, like the Respondent, has few employees. Moreover, S. Sanders' questions merely followedup Feeley's own statement, volunteered during his application interview, that he was a union plasterer temporarily out of work. The questioning took place against a background of good relations between the Respondent and Feeley. Feeley knew that the Respondent had hired him even though it was aware that he had worked as a union plasterer in the past. The exchange itself was very brief, friendly enough in tone, and not, it appears, repeated. The information sought was minimal. S. Sanders asked the questions during a lunch break and there was no evidence that she summoned Feeley to an office or some other location that he would be likely to find intimidating. There was no suggestion in the questioning that Feeley's union status might lead the Respondent to take adverse action against him.

The questioner, S. Sanders, was the Respondent's owner and president, and had authority to discharge or otherwise discipline Feeley. The fact that an official in that position asked the questions provides some support for the view that the questioning was coercive. However, I believe that support is blunted here since the Respondent is a very small employer and S. Sanders routinely works with tools at jobsites alongside the Respondent's employees. Thus she was not some distant presence that employees rarely encountered and with whom any conversation would be inherently intimidating to employees. Furthermore, as already noted, S. Sanders and Feeley had a good working relationship and it is apparent that S. Sanders was hoping that the Respondent would be able to retain Feeley as an employee. To whatever extent the identity of the questioner in this case weighs in favor of concluding that the questioning was coercive, that is outweighed by the other evidence, discussed above,

which supports the conclusion that the questioning was not coercive.

Under all the circumstances, I conclude that S. Sanders' questioning did not reasonably tend to restrain, coerce, or interfere with Feeley's Section 7 rights. *Sunnyside Health Care Project*, 308 NLRB 346 fn. 1 (1992). Based on the record as a whole, I conclude that the allegation regarding S. Sanders interrogation of Feeley should be dismissed.

7. Threats against Feeley

The complaint alleges that on about October 3, 2000, the Respondent threatened an employee with unspecified reprisals, legal action, and arrest, and accused him of being a union spy because the employee supported the Union. (Complaint par. 5(e) and par. 6.) I conclude that the General Counsel has proven that the Respondent, by S. Sanders and M. Sanders, made threats against Feeley in violation of Section 8(a)(1).

On October 3, 2000, Feeley responded to the Respondent's invitation to refer new employees, by arriving at work with applicant-organizer Kilkenny. Feeley's referral of a union member and organizer to apply for the opening was protected activity. The Respondent turned Kilkenny away, and later that day Feeley received the phone messages from S. Sanders and M. Sanders, which are alleged to contain threats that violate Section 8(a)(1).

In deciding whether a remark is threatening in violation of Section 8(a)(1), the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of the such coercion. *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995); *American Freightways*, 124 NLRB at 147. I conclude that S. Sanders' statements, especially that she was going to "get" Feeley "very soon," that she knew where he lived, and that what "goes around" "comes around" are reasonably construed as threats of violence or other harm. See *Letter Carriers (Postal Service)*, 333 NLRB No. 41, slip op. at 2 (2001) (statement that "what goes around comes around" reasonably construed as threat and violated Section 8(a)(1)); *Delco Electronics Corp.*, 325 NLRB 653, 656 (1998) (threat to "get" employee for having called in the Union violative of Section 8(a)(1)); *Local Joint Executive Board of Las Vegas*, 323 NLRB 148, 160–161 (1997) (statements "we know where you live" and "we're going to get you" were implicit threats of bodily harm and were violative of Section 8(b)(1)(A) of the Act).

S. Sanders and M. Sanders also both said that their lawyer was going to contact Feeley, and S. Sanders added that she could have Feeley arrested. Feeley reasonably understood this to mean that "some type of action was going to be taken against" him. I conclude that these remarks regarding legal action also constitute threats. See *Indio Grocery Outlet*, 323 NLRB 1138, 1142–1143 (1997) (employer violated Section 8(a)(1) by threatening to have union representatives arrested for conduct that was exercise of Section 7 rights), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Holy Cross Hospital*, 319 NLRB 1361, 1366 (1995) (employer violated Sec. 8(a)(1) by threatening that it would take legal action against union members if they engaged in certain Sec. 7 activity); *Carborundum Materials Corp.*, 286 NLRB 1321, 1322–23 (1987) (employer violated Sec. 8(a)(1) when supervisor threatened employee with lawsuit).[23]

A reasonable person in Feeley's position would view these threats as being in retaliation for the fact that he assisted the Union by referring a union member and organizer to the Respondent as an applicant. The threatening messages were left the same day that Feeley appeared at the jobsite with Kilkenny, and there was no prior history of conflict between Feeley and the Respondent that would explain their harsh tone. There is no evidence that Feeley was aware of the specifics of what had transpired when Kilkenny applied on August 16, or believed that the Respondent considered Kilkenny an undesirable applicant for reasons other than Kilkenny's union affiliation. In the threatening messages, both M. Sanders and S. Sanders referred to Feeley as a spy, and M. Sanders specifically called him a spy *for the Union.* M. Sanders stated that Feeley and the Union should have "better things to do" and that the Respondent's lawyer would "be contacting [Feeley] and the Union." Given the content of the threatening messages as well as the surrounding circumstances, the recipient of such messages would reasonably conclude that the threats were made because of activity in support of the Union and such threats would tend to coerce and intimidate the recipient in the exercise of his Section 7 rights. Indeed, Feeley testified credibly that because he felt threatened he never returned to work for the Respondent after hearing the messages.[24]

For the reasons discussed above, I conclude that the General Counsel has succeeded in showing that on October 3, 2000, the Respondent threatened retaliation against Feeley in violation of Section 8(a)(1).[25]

[23] The Respondent argues the Respondent's statements that their lawyer was going to contact Feeley cannot be unlawful threats because employers have a right to consult their lawyers. R. Br. at 18. This is a "straw man" argument. The General Counsel has not suggested that the Respondent could not consult with its own lawyer. What the General Counsel alleges is that the Respondent violated Sec. 8(a)(1) by threatening to take legal action against Feeley because of his Sec. 7 activity. Indeed, M. Sanders testified that he made the remark that his lawyer would be contacting Feeley and the Union because he was angry.

[24] In its brief, the Respondent contends that "[i]n light of Ms. Sanders diminutive stature it is truly inconceivable that Mr. Feeley feared any harm from Ms. Sanders." R. Br. at 17. This argument lacks merit. Feeley had no assurance that if S. Sanders wished to carry out her threats she would do so personally. In any case, there are any number of ways in which S. Sanders could have harmed Kilkenny without physically overpowering him, especially given the hazards present at construction sites.

[25] In the same complaint paragraphs in which the General Counsel alleges that the Respondent threatened an employee by telephone on October 3, 2000, the General Counsel also alleges that the Respondent accused the employee of being a spy for the Union by telephone on that date. I consider the Respondent's use of the derogatory term "spy" as contributing to the threatening import of the telephone messages left by the Respondent. Since I conclude that the term "spy" was part of the unlawful threats, I do not consider the question of whether the use of that term would independently rise to the level of a violation of Sec. 8(a)(1), given the facts of this case.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by instructing employee Feeley not to discuss his wages with other employees.

4. The Respondent violated Section 8(a)(1) of the Act by making threats against employee Feeley because he supported the Union.

5. The Respondent did not commit the other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[26]

ORDER

The Respondent, Exterior Systems, Inc., of Mount Laurel, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting any of its employees not to discuss their wages with other employees.

(b) Threatening any of its employees because they support a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Post at its office in Mount Laurel, New Jersey, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 4, after bein sined by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 2000.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 18, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT instruct employees not to discuss their wages with other employees.

WE WILL NOT any employee because he or she supports a union threaten.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

EXTERIOR SYSTEMS, INC.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."